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ACCOUNT.

LIMITATION AGAINST RUNNING ACCOUNT. When it is fairly inferable from the conduct of the parties to a running account while it is accruing, that the whole is to be regarded as one account, none of the items are barred by the statute of limitations, unless all are (*following Madison Coal Co. v. Steamboat Colona*, 36 *Mo.* 446 *and other cases*); *Ring v. Jamison, Admr.*, 424.

SEE EQUITY,

ACTION.

1. STATUTE OF FRAUDS. No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part. *Galway v. Shields*, 313.

2. CASE ADJUDGED. In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement. *Ib.*

SEE DAMAGES, 1.

ADMINISTRATION.

1. DEVISEE AND EXECUTOR: EJECTMENT. Under the administration act, (Wag. Stat., 89, §§ 48, 49,) a devisee of real estate cannot maintain ejectment against one holding under a lease made by the executor of the devisor in obedience to an order of the probate court. The act expressly authorizes the executor to lease the real estate of his decedent, when so directed by competent authority, and the right of the devisee is subordinate to this. *Eoff v. Thompkins*, 225.

2. SUBROGATION: RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE. An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties

were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor. and for general relief, the deed was set aside, and *it was Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Wernecke v. Kenyon's Admr.*, 275.

3. PROBATE JURISDICTION: STATUTE CONSTRUED. In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Ib.*

4. EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale, conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.

5. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.

6. LACHES OF CREDITOR, WHAT IS NOT. Where such a contract is made, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the time to which the payment has been extended, and the creditor cannot, therefor, invoke against him the statutory bar created by sections 2 and 6, article 4 of Wagner's Statutes. *Ib.*

7. SECTIONS 2 AND 6, p. 102, WAG. STAT., CONSTRUED. Where such a contract was made by the executor in good faith, and with the implied sanction of the probate court, and in the interest of the estate, and the creditor, in consequence thereof, was prevented from proving up his claim; and it appeared that, within four months after the testator's death, the creditor and executor appeared in the probate court and the executor waived service of notice, but the demand was not allowed for the reason that it was not then due, and that, within two years after publication of notice, the executor, at the instance of the creditor, filed the deed of trust describing the said note and the interest notes, which latter were paid by the executor, and filed with the papers of the estate as vouchers, with the approval of the court, and that the creditor brought suit upon the note in the circuit court within two months after the expiration of the extended time; *Held*, that there was a substantial compliance with sections 2 and 6, p. 102, Wag. Stat., in regard to the exhibition and application for allowance of the claim against the estate. *Ib.*

8. EXECUTOR'S FINAL SETTLEMENT CONCLUSIVE ON HIS SURETIES. An order of the probate court made upon a final settlement, ascertaining a balance to be due from an executor and directing him to pay it over, is conclusive against his sureties in an action on his bond, (*following, State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17); *Dix v. Morris*, 514

9. LIABILITY OF EXECUTOR ADMINISTERING ON REAL ESTATE. Although the general principle is that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets; yet, when, as matter of fact, he assumes control of it and collects the rents, or when the will gives him authority to sell, and he exercises the authority, he is liable on his bond as executor, if he fails to account for the rents or for the proceeds of sales. *Ib.*

10. ADMINISTRATOR'S SALE: EFFECT OF APPROVAL OUT OF TIME. An order of a county or probate court approving a sale of real estate by an administrator, when made at a term different from that prescribed by law, is not void, but voidable only. (*Speck v. Wohlien*, 22 *Mo.* 310; *Strouse v. Drennan*, 41 *Mo.* 289; *Mitchell v. Bliss*, 47 *Mo.* 354, *criticised*); *Murray v. Purdy*, 606.

11. AN ADMINISTRATOR'S DEED is not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made, (*following Johnson v. Beazley*, 65 *Mo.* 250.) *Sims v. Gray*, 613.

12. EJECTMENT: VOID ADMINISTRATOR'S DEED: EQUITY: PLEADING. When a defendant in ejectment, holding under a deed made by the administrator of plaintiff's ancestor, admits that the deed does not convey the legal title, he cannot bar the plaintiff's recovery by showing that he paid the purchase money, that the administrator applied it in payment of the debts of the estate, and that he has since paid the taxes and made lasting improvements on the land; but these facts entitle him to have an account taken, and to have the sum found to be due him declared a lien upon the land.

An answer setting up this defense and not praying such relief, is defective. *Ib.*

SEE ATTORNEY AND CLIENT, 1.

EVIDENCE, 13.

FRAUDULENT CONVEYANCE, 1, 2.

WITNESS, 4.

ADVERSE POSSESSIONS.

WHEN adverse possession is such that it may be presumed that the true owner had knowledge of it, and has acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time. *Key v. Jennings*, 356.

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See Deed of Trust

AGREED COMBAT.

See Murder, 8.

AMENDMENT.

Judgment against a married woman: under the statute of amendments and jeofails (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20), a judgment at law against several defendants, one of whom appears by the record to be a married woman, may, in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

Per Hough, J., Dissenting.

Such a judgment is a mistake of law, and is erroneous, and can only be corrected on appeal or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Weil v. Simmons*, 617.

See Misnomer.

APPEAL.

1. Appeal: final judgment. An appeal from an order setting aside a final judgment is premature. It should not be taken until another final judgment has been entered in the cause. *State ex rel. Merrill v. Burns*, 227.

2. Final judgment. In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.

See Amendment. 1.

ARBITRATION.

The parties to a promissory note differing as to the amount remaining due upon it, referred their difference to arbitrators, who fixed the amount and informed the parties. The holder thereupon surrendered the note to the maker, who accepted it; *Held*, that he thereby assented to the award, and became bound to pay the amount fixed by the arbitrators, although they may not have proceeded regularly in ascertaining it. *Phillips v. Couch*, 219.

ASSAULT TO KILL.

See Felony.

ASSAULT TO RAPE.

See Rape.

ATTACHMENT.

Motion to set aside judgment and quash execution. A motion to set aside a judgment and to quash the execution for irregularity in the judgment, must, in attachment cases, be filed within two years after the rendition of the judgment, or it will be unavailing. *McGrew v. Foster*, 30.

See Execution, 1.

Garnishment, 1.

ATTORNEY AND CLIENT.

An attorney at law employed to attend to any and all cases that may arise affecting or designed to affect the title of his client to certain lands, is not thereby authorized to assist in procuring from the probate court an order that the lands be sold by the administrator of the former owner as the property of his intestate, even though this is done with a view of giving his client an opportunity to perfect his title by buying at such sale. *Hall v. Callahan*, 316.

See Practice, 5.

AUTREFOIS ACQUIT.

Larceny of money, national bank notes: evidence. A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (*overruling State v. Kroeger*, 47 *Mo.* 530). *The State v. Moore*, 372.

BILL OF EXCEPTIONS.

1. An entry of record is necessary to authenticate a bill of exceptions, and to show that it has been filed. *McGrew v. Foster*, 30.

2. Bill of exceptions. A bill of exceptions must be filed, in order to constitute a part of the record; and this must appear by an entry in the record proper; neither the indorsement of the clerk on the

bill of exceptions, "filed," with day and date, nor the statement, by the judge that it is signed, sealed and made part of the record, nor both, will suffice, (*following Fulkerson v. Houts*, 55 *Mo.* 301, *and other cases*). *Pope v. Thomson*, 661.

SEE PRACTICE IN SUPREME COURT, 2.

CASHIER.

SEE PRINCIPAL AND AGENT, 3.

CAVEAT EMPTOR.

THE doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property not in the possession of the grantor in the deed of trust, but in the possession of a third party. *Fletcher v. Drath*, 126.

CHAMPERTY.

IN this State, champertous contracts are void; but, a contract between attorney and client is not champertous, because the attorney agrees to receive, as a compensation for his services, a portion of the property in controversy; it is an essential element in a champertous contract, that he also agree to pay some portion of the costs or expenses of the litigation. *Duke et al. v. Harper et al*, 51.

CHANGE OF VENUE.

SEE VENUE.

CLERK'S FEES.

SECTION 24, ARTICLE 6, CONSTITUTION of 1865, fixed the maximum of the compensation of clerks of courts at twenty-five hundred dollars, but left it to the Legislature to determine what compensation they should receive within that maximum. (SHERWOOD, C. J., dissenting.) *In the matter of Burris*, 442.

CLOUD ON LAND TITLES.

SEE EQUITY, 2.

COMPUTATION OF TIME.

SEE PRACTICE, CRIMINAL, 5.

CONFEDERATE STATES.

SALE UNDER TRUST DEED, NOT AFFECTED BY VOLUNTARY ABSENCE OF TRUSTOR IN CONFEDERATE STATES. A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the Confederate States, if he was a citizen of Missouri at the time the deed was executed, and his removal within the Confederate lines took place after the debt matured and was voluntary. *Martin v. Paxson*, 260.

CONSIDERATION.

1. PLEADING CONSIDERATION OF A NOTE. In declaring upon a written promise to pay money, it is not necessary to aver a consideration for the promise, but if one be averred, it must be a good consideration; otherwise the petition will be demurrable. *Glasscock v. Glasscock*, 627.

2. CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION. An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Ib.*

CONSIGNOR AND CONSIGNEE.

CONSIGNMENT: NOT NOTICE TO CONSIGNEE THAT HE IS REGARDED AS PURCHASER. The fact of a consignment of goods is not of itself notice to the consignee that he is held by the consignor as the purchaser of the goods sent. *Peck v. Ritchey*, 114.

CONSTITUTIONAL LAW.

1. EX POST FACTO LAWS. The Legislature has no power to change the punishment of an offense by a statute passed after it is committed. Such legislation is *ex post facto;* and, except where such change consists in the remission of some separable portion of the punishment, a statute making it must be held constitutionally inapplicable to antecedent transactions. The court cannot inquire whether it should not be applied in every case where it may be supposed to mitigate the punishment; for there is no test by which to determine whether it has that effect. Per SHERWOOD, C. J., *State ex rel. Houston v. Willis*, 131.

2. SECTION 27, ARTICLE 4, CONSTITUTION OF 1865, which provided that "the General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act in force at the time of the adoption of the

constitution, giving such a right. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

3. CONDITIONAL PARDON. Under the Constitution of 1865, the Governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper. *Ex parte Reno*, 266.

4. CONSTRUCTION OF CONSTITUTIONS. In general, constitutions, like statutes, are to be construed as prospective only, but when a contrary intent is plainly apparent from the words employed, a different construction will prevail. *The State ex rel. Baird v. Holladay*, 385.

5. CONSTITUTIONALITY OF LAWS. The courts are warranted in declaring an act of the Legislature void, only where there is a clear conflict between it and the Constitution. *In the matter of Burris*, 442.

6. SECTION 32, ARTICLE 4, CONSTITUTION OF 1865, required that the title of an act of the Legislature should indicate the general subject of the act, but did not require that it should set out its substance. *Ib.*

7. CLERK'S FEES: SECTION 24, ARTICLE 6, CONSTITUTION of 1865, fixed the maximum of the compensation of clerks of courts at twenty-five hundred dollars, but left it to the Legislature to determine what compensation they should receive within that maximum. (SHERWOOD, C. J., dissenting.) *Ib.*

8. EX POST FACTO LAWS. The phrase defined (*following Calder v. Bull*, 3 *Dallas* 386). *Ex parte Bethurum*, 545.

9. RETROSPECTIVE LAWS. The constitutional prohibition against the enactment of laws retrospective in their operation, relates to such as concern civil rights and remedies, and not such as concern crimes and punishments or criminal procedure. Constitution of 1875, Art. 2, § 18. *Ib.*

10. HABEAS CORPUS: CORRECTION OF JUDGMENTS IN CRIMINAL CASES. The act of March 1st, 1877, (Sess. Acts, p. 261,) requiring any court to which application is made by *habeas corpus* for the release of any prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment or for the correct length of time, authorizes the correction of erroneous sentences passed previous to that date, and is not void either as an *ex post facto* law or as retrospective in its operation. *Ib.*

11. JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES. The foregoing act is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ib.*

12. TAXATION: SECTION 30, ART. 1, CONSTITUTION OF 1865, which provided that "all property subject to taxation ought to be taxed in proportion to its value," while it enjoined a uniform rule in imposing taxes on property, did not abridge the power of the Legislature to provide

revenue from other sources, (*following Glasgow v. Rowse*, 43 *Mo.* 479). *American Union Express Company v. City of St. Joseph*, 675.

13. MUNICIPAL POWERS OF TAXATION: UNIFORMITY AND EQUALITY. A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *Ib.*

14. STATE TAXATION ON RECEIPTS OF EXPRESS COMPANIES, NO INFRINGEMENT ON POWER OF CONGRESS TO REGULATE COMMERCE. A tax levied by State authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the State, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to Congress alone the power to regulate commerce with foreign nations and among the several States, (*following Erie R. R. Co. v. Pennsylvania*, 15 *Wall.* 284). *Ib.*

SEE CONTRACTS, 3, 4.

COURTS, 2.

SCHOOL, 2.

CONTRACT.

1. DEED OF TRUST: NOTICE OF FORECLOSURE. A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days notice of the time, terms and place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding. *Martin v. Paxson*, 260.

2. CONTRACTS OF PUBLIC CORPORATIONS: RATIFICATION OF, BY STATE. The General Assembly, by an act passed in December, 1855, enacted, "that all contracts made by the trustees of the town of New Franklin; for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act, but two contracts had been made by the trustees, one in 1842, the other in 1849; and long prior to its passage, the contract of 1842 had been declared valid by the judgment of this court; *Held*, that the State,

by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. *The State ex rel. Attorney General v. Miller*, 328.

3. ———: MODIFICATION OF, WHEN VALIDATED BY LEGISLATIVE ACT: SUCH ACT NOT OBNOXIOUS AS A RETROSPECTIVE LAW. The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operations; the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *Ib.*

4. ———: ———: VESTED RIGHTS UNDER. Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their privileges, rest upon anything like a contract between them and the legislature; but, when such a corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State; such a contract becomes, *pro hac vice*, the contract of the State, and if imperfectly made, can be validated by it, and, when so validated, cannot be violated by the State. *Ib.*

5. ———: VESTED RIGHTS UNDER: WHEN THEY CANNOT BE DIVESTED BY QUO WARRANTO. When the State, through the agency of a public corporation, makes a contract with a third person, and such contract imposes no obligation upon such person to look to the application of the money to be paid by him under such contract, it cannot, by a proceeding by *quo warranto* forfeit and take away the right of the assignees of such person, because such corporation does not apply the funds realized to the object for which they were intended. *Ib.*

6. RATIFICATION OF INFANT'S CONTRACT. The validity of a promise by an adult to pay a debt incurred by him during his minority, is not affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt, or by the fact that during his minority his curator kept him supplied with all necessaries. *Ring v. Jamison, Admr.*, 424.

7. POWER OF A COURT OF EQUITY TO REFORM CONTRACTS. A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo;* as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.

8. SPECIFIC PERFORMANCE. The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Olney v. Eaton*, 563.

9. OBLIGATION PAYABLE IN MERCHANDISE : TENDER. A merchant having an established place of business executed a contract for the payment of money in one year after date, but containing a stipulation that it should be "payable in merchandise to be taken during the year." *Held*, that he was under no obligation to tender the merchandise. Readiness on his part at his place of business whenever called upon by the creditor, to perform the contract, prevented any default being attributed to him. It was the duty of the creditor to select and take at his place of business such articles as he desired. *Lakey v. Chadwick*, 622.

SEE CONSIDERATION, 2.

INSURANCE, 1, 2.

LANDLORD AND TENANT, 1.

CONVEYANCE.

SEE DEED.

FRAUDULENT CONVEYANCE, 1.

CORPORATION.

1. CORPORATE EXISTENCE PROVED BY LEGISLATIVE RECOGNITION. The State having sold a railroad to certain individuals, requiring them to form themselves into a corporation, and the Legislature having, in several subsequent acts, recognized the existence of the corporation; *Held*, that its existence could not be questioned by third parties, and such recognition dispensed with other evidence of the fact. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

2. CORPORATION DEED. A deed from one corporation to another, is *prima facie* valid when signed by the proper officers, and under the corporate seal of the grantor, if, by law, the grantor has power to sell, and the grantee, to purchase. It devolves upon any one denying the validity of the deed on the ground that the stockholders have not assented to its execution, to prove that fact. *Ib.*

3. RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES. Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Ib.*

4. RAILROADS: ACCEPTANCE OF STATUTORY PRIVILEGES. An act passed in 1864, (Sess. Acts, p. 478,) authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Ib.*

5. RAILROADS: DUTY OF CONDUCTOR IN EJECTING PASSENGER. If one goes upon a railroad train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion, and if he does, the company is responsible in damages for any resulting injury. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE MUNICIPAL CORPORATION.

COSTS

PRACTICE: POOR PERSON: SECURITY FOR COSTS. An order, allowing the plaintiff to sue as a poor person, is, in effect, revoked by a subsequent order requiring him to give security for costs, and the absence of a formal order of revocation is not such an irregularity as will justify an appellate court in reversing the judgment of dismissal by the trial court for failure to furnish such security. *Kelty v. Valle*, 601.

COUNTY BONDS.

RAILROAD BONDS: FRAUDULENT ISSUANCE OF: INNOCENT PURCHASER. Where certain railroad bonds were fraudulently issued by means of a covenous conspiracy formed between two of the justices of the county court, their deputy clerk, the prosecuting attorney and others, and, upon a division of the bonds in St. Louis, one of the conspirators received $55,000 in the fraudulent bonds, and effected a sale of them to Mastin & Co., bankers in Kansas City, two days thereafter, under circumstances which showed that the members of that firm, as well as defendant, had such notice of the fraud perpetrated, as should have forbidden a purchase of the bonds; *Held*, first, that although the evidence of such knowledge was not of a direct, positive character, yet, that it was sufficient, if it established the fact of knowledge by reasonable inferences deduced from facts which were proven; and to such obvious inferences courts are not permitted to close their eyes; second, that though, primarily, the presumption favors the holder of paper acquired before maturity, yet, that such a presumption dwindles into insignificance when circumstances of the nature above noted, occur; third, that the bonds having been fraudulently issued, the *onus* of showing their acquisition in good faith devolved on defendant; fourth, that Mastin & Co., as well as defendant, being chargeable with notice, the latter could not successfully invoke the doctrine which permits even a purchaser, with notice, to purchase from one without notice; and as there were many mysteries, contradictions and incongruities apparent in the testimony, and defendant, whose deposition had been

previously taken, conducted the trial, but failed to introduce any evidence in contradiction to, or explanation of, certain damaging statements, tending very strongly to establish his lack of good faith, his failure to introduce such evidence, created a presumption adverse to his success; and such unfavorable presumption is very strong, when the *bona fides* of the given transaction is questioned by the form of the procedure, and the nature and organization of the court, where instituted; that, although the testimony of defendant tended to show the transfer of the bonds by him before suit brought, yet as such alleged transfer occurred the day after the notice of injunction was served on him, and with evident intent to evade the process of the court, and he had made statements about the bonds which he afterwards contradicted in his deposition; that, as the transferree of the bonds was not complaining, defendant could not be heard to vicariously complain; and the trial court having disbelieved his testimony respecting the transfer of the bonds, this court would do likewise; and held, further, that as defendant kept the bonds concealed so that their whereabouts could not be discovered, nor they be reached by ordinary process, and as defendant threatened to transfer the bonds, although the bonds were really invalid, yet, as they were apparently good, the remedy by law was manifestly inadequate, and equity would interfere—this being a case analogous to that where it interferes to remove a cloud upon a title to land. *Cass County v. Green*, 498.

COURTS.

1. INFERIOR: LIMITED. A court is inferior to another under whose supervisory or appellate control it is placed; a court of limited jurisdiction is also inferior to a court of general jurisdiction. Limited jurisdiction extends only to certain specified causes; general, to a great variety of matters. *State v. Daniels*, 192.

2. CRIMINAL COURT OF THE SIXTH JUDICIAL CIRCUIT AND THE COUNTY OF JOHNSON, AN INFERIOR AND CONSTITUTIONAL COURT. Section 13, Art. 6, of the constitution of 1865, declared "that the circuit court shall have jurisdiction over all criminal cases, which shall not otherwise be provided for, by law." *Held*, that this section, by necessary implication, authorized the legislature to provide by law for taking from circuit courts jurisdiction over all criminal matters. *Held*, also, that Sec. 4, of the Schedule of the constitution of 1875, providing "that all courts organized and existing under the laws of the State, and not specially provided for in this constitution, shall continue to exist until otherwise provided for by law," must be regarded, till other provision is made, as imparting vitality to the criminal court of the Sixth Judicial Circuit and Johnson county, which was organized and existing at the time of the adoption of the constitution of 1875. *Held*, also, that Sec. 23, Art. 6, of the constitution of 1875, providing that circuit courts shall exercise superintending control over criminal courts, * * * in each county in their respective circuits, places the criminal court in question in the class of inferior courts which the General Assembly may establish in virtue of Sec. 1, Art. 6, of the constitution of 1865. *Held*, also, that the act of 1875, creating the court in question, was not obnoxious to that provision of the constitution of 1865, which prohibits the enactment of a special law when a general law could be made applicable; so held, on the ground that it was for the legisla-

ture to determine whether a necessity existed for this criminal judicial circuit, and did not exist for such circuits in other portions of the State. *Ib.*

3. CHANGE OF VENUE FROM THIS COURT. In the act establishing this court, it was provided that, "In all cases where a change of venue is granted from said criminal court on the ground of prejudice, or other disqualification of the judge of said court, the same shall be certified to the circuit court of the county in which said cause shall be pending," but there was in said act this further provision, "that all acts now in force, or that may hereafter be made, regulating the criminal practice and proceedings in courts of record, * * * shall govern the proceedings in said criminal court so far as the same may be applicable;" and by a subsequent act it was declared, "that hereafter no change of venue shall be awarded in any indictment or criminal prosecution in any circuit or criminal court in either of the following cases," the prejudice of the judge being one of the specified causes, and it was further declared that whenever in any cause an application should be made for a change of venue for any of the specified causes, the judge should make an order for the election of a special judge to try the case; *Held*, that the court was powerless to make any other order than one for the election of a special judge to try the cause. *Ib.*

4. RECORDS. Where the record of an inferior court, which is, however, a court of record, and exercises its jurisdiction according to the course of the common law, recites that members of the bar, exceeding three in number, voted at the election of a special judge, the further recital that such members of the bar were duly licensed and enrolled is not required. *Ib.*

5. THE PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY was not abolished by the constitution of 1875. *State v. Hart*, 208.

6. PROBATE JURISDICTION: STATUTE CONSTRUED. In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Wernecke v. Kenyon*, 275.

COURTESY.

SEE LIMITATIONS, 2.

COVENANT.

SEE MINING LICENSE, 1.

CRIMINAL LAW.

1. NEGLIGENTLY COMPOUNDING A MEDICAL PRESCRIPTION. An indict-

ment under Sec. 18, p. 447, Wag. Stat., against a druggist for manslaughter in negligently filling a medical prescription with opium, by reason of which the person to whom it was administered died, failed to charge that defendant delivered the medicine to any one to be administered to deceased, or to state what were the ingredients named in the prescription, or the respective quantities of the several ingredients, or by whom the medicine was prescribed; *Held*, that these were essential averments, and without them the indictment was defective. *State v. W. H. Smith*, 92.

2. AUTREFOIS ACQUIT: LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE. A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (*overruling State v. Kroeger*, 47 *Mo.* 530.) *State v. Moore*, 372.

3. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *State v. Green*, 631.

SEE EVIDENCE, 7, 8.

GRAND JURY, 1.

OFFICER, 1, 2, 3, 4.

CROSS-BILL.

SEE PRACTICE, 3.

DAMAGES.

1. POWER OF SCHOOL DIRECTORS TO MAKE RULES: LIABILITY FOR ENFORCING THEM. The school law (W. S., p. 1264, § 8), provides that the board of directors "shall have power to make and enforce all such needful rules and regulations for the government, management and control of the schools and their property as they shall think proper * * not inconsistent with the laws of the land." A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, by the permission of his parents, violated the rule, and was expelled from the school for so doing. In an action against the directors to recover damages for the expulsion, *Held*, 1*st*, that under the law, they had the power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; that in prescribing the foregoing rule they had gone beyond their power, and had invaded the rights of the parents; but, 2*nd*, as there was no malice, oppression or willfulness on the part of the directors, they were not liable in damages. *Dritt v. Snodgrass*, 286.

2. DAMAGES, COMPENSATORY AND EXEMPLARY. A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has actually sustained, and which he could not have averted by reasonable exertion, care and prudence, unless he was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, in which case, he may recover punitive or exemplary damages from the company, where, after knowledge of the fact, they retain in their employ, and in the same capacity, the servant who has been guilty of such misconduct. *Graham v. Pacific Railroad Co.*, 536.

3. DAMAGES: WHEN NOT SO EXCESSIVE AS TO AUTHORIZE REVERSAL. A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice or corruption on the part of the jury. *Ib.*

4. RAILROADS: PASSENGER, RIGHTS OF: "STOCK PASS." A passenger who presents to the conductor a "stock pass" from the railroad company which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. *Ib.*

5. CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES. Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.

SEE PERSONAL INJURIES, 1.

RAILROADS, 15, 17, 18, 19, 20.

DEEDS.

1 CORPORATION DEED. A deed from one corporation to another, is *prima facie* valid when signed by the proper officers, and under the corporate seal of the grantor, if, by law, the grantor has power to sell, and the grantee to purchase. It devolves upon any one denying the validity of the deed on the ground that the stockholders have not assented to its execution, to prove that fact. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

2. RESCISSION FOR MISDESCRIPTION. Misdescription of land in a deed

will not authorize rescission of the contract of sale, when it appears that the vendee has been put into possession of the very land which he intended to buy and the vendor intended to sell, and that he has for several years retained undisputed possession; nor when the vendor offers to deliver a deed correctly describing the land. *Key v. Jennings*, 356.

3. ADMINISTRATOR'S DEED is not void by reason of the fact that the sale was reported to and approved by the court at the same term at which it was made, (*following Johnson v. Beazley*, 65 *Mo.* 250.) *Sims v. Gray*, 613.

4. DEEDS, CONSTRUCTION OF: CALLS FOR QUANTITY. In ascertaining the land that has been conveyed by a deed, a call for quantity will be rejected when inconsistent with the actual area of the premises as particularly described. *Ware v. Johnson*, 662.

SEE ADMINISTRATION, 12.

EVIDENCE, 17.

DEED OF TRUST.

1. ONE who gives a deed of trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to inclose and use part of the land, is void as against a purchaser at a sale under the deed of trust. *Sims v. Field*, 111.

2. SUBSTITUTION OF TRUSTEES. It is not necessary to the validity of proceedings under Rev. Stat. 1855, p. 1554, § 1, for the appointment of the sheriff to act as trustee in executing a deed of trust given to secure the payment of a debt in place of the person therein named as trustee, that the latter shall have signed the deed or otherwise signified his acceptance of the trust; nor is notice of the proceeding required to be given to the trustor. *Martin v. Paxson*, 260.

3. SALE UNDER TRUST DEED, NOT AFFECTED BY VOLUNTARY ABSENCE OF TRUSTOR IN CONFEDERATE STATES. A sale under a deed of trust given by a debtor to secure the payment of his debt, is not invalidated by the fact that at the time it was made he was residing within the military lines of the Confederate States, if he was a citizen of Missouri at the time the deed was executed, and his removal within the Confederate lines took place after the debt matured and was voluntary. *Ib.*

4. DEED OF TRUST: NOTICE OF FORECLOSURE. A stipulation in a deed of trust given to secure the payment of a debt, that in the event of default in payment the trustee may sell the trust property lying in Morgan county, at public sale, at the court house door in Boonville, Cooper county, first giving at least thirty days notice of the time, terms and place of sale, and of the property to be sold, by advertisement in Morgan or adjoining county, is not void for uncertainty or as being against public policy. Such matters are proper subjects of contract between the parties, and their contract is binding. *Ib.*

5. DISTRIBUTION OF PARTNERSHIP ASSETS. A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *Held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 554.

6. EVIDENCE: THE RECITALS IN A TRUSTEE'S DEED purporting to be executed in pursuance of a power of sale given by a deed of trust, are of themselves, no evidence of the facts stated, unless made so by express provision of the deed of trust, (*following Neilson v. Chariton Co.*, 60 *Mo.* 386; *Vail v. Jacobs*, 62 *Mo.* 130). *Hancock v. Whybark*, 672.

7. TRUSTEE'S AFFIDAVIT OF NOTICE: ADVERTISEMENT. The affidavit of a trustee in a deed of trust showing compliance with a requirement of the deed that he should give notice of sale by posting an advertisement in ten public places before proceeding to sell under it, is not admissible in evidence as a publisher's affidavit within the meaning of section 7, p. 125, Wag. Stat. He must be introduced as a witness to prove the fact. *Ib.*

8. EVIDENCE: ESTOPPEL. Evidence showing that the power of sale was extinguished by payment of the debt before the sale under the deed of trust, is admissible where the purchaser at such sale is the *cestui que trust*, and is seeking to recover possession of the property purchased from the grantor in the deed of trust. But, evidence of facts constituting an estoppel against the grantor from setting up such a defense, is also admissible. *Ib.*

9. EVIDENCE is admissible to show that a portion of the property seized by the sheriff, under a writ of replevin, as appurtenant to certain personal property conveyed by a deed of trust, was not a part thereof when the deed was executed, and was not included therein. Whether it passed as after acquired property is a question of law for the court on the facts proven. *Ib.*

SEE CAVEAT EMPTOR, 1.

DELIBERATION.

SEE MURDER, 1.

DELIVERY.

SEE PARDON, 2.

DESCENT.

UNLAWFUL MARRIAGE: INHERITABLE CAPACITY OF ISSUE. Under section 8, p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law * * shall, nevertheless, be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage. *Dyer v. Brannock*, 301.

DISEASE.

AS AFFECTING LIABILITY FOR PERSONAL INJURIES. The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

DOWER.

FINAL JUDGMENT: APPEAL. In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.

DRUGGIST.

NOT A PRIVILEGED WITNESS. A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to a suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

EJECTMENT.

PRACTICE: CHANGE OF VENUE: JURISDICTION. Unless an ejectment case is transferred by a proper order entered of record from the court of the county in which the land lies, no court in any other county can acquire jurisdiction of it; and the question of jurisdiction may be raised for the first time in the Supreme Court. *Bray v. Marshall*, 122.

SEE ADMINISTRATION, 1.

EQUITY, 7.

EVIDENCE, 18.

LICENSE, 4.

ELECTION.

NOTICE OF CONTEST. The statute (Wag. Stat., p. 573, § 57) requires contested elections to be determined at the first term of the county court, which shall be held fifteen days after the official count, but does not specify whether the term shall be a regular, or a special, or an adjourned term, although provision is made by law for all such terms. Notice was given by the contestant that he would contest the election of the contestee to the office of collector, at the next term of the county court, to be begun and holden on the first Monday in January, 1877, but it appeared that the next term after this notice was given was on the first Monday in February, 1877, and that no court was held in January; *Held*, that the day specified in the notice was material, and that the notice given was insufficient to sustain proceedings begun on the first Monday in February. *Adcock v. Lecompt*, 40.

EQUITY.

1. PURCHASE WITH NOTICE: TRUSTEE: ESTOPPEL. Defendants' grantor entered a tract of government land, and took from the receiver of the local land office a receipt for the purchase money, describing the land. By a mistake of the officer the records of the General Land Office at Washington were made to show an entry of a different tract, and a patent was issued accordingly. The records of the local office were afterwards destroyed by fire. Without taking actual possession defendants' grantor claimed to be the owner of the tract designated in the receipt. Nevertheless, for a period of seventeen years he permitted the other tract to be assessed to him for taxation, and during a part of the time at least, paid the taxes on it. The tract described in the receipt never was assessed to him. Plaintiff knew that defendants' grantor had intended to enter that tract, and that he claimed title to it. Finding, however, that the government records showed it to be vacant and subject to entry, plaintiff purchased and obtained a patent for it in his own name. Neither the defendants nor their grantor ever took any step to have the mistake corrected until after the issue of the patent to plaintiff; *Held*. 1st, That these facts were not sufficient to put plaintiff on inquiry, or to affect him with notice of a title in defendants, or to constitute him a trustee for them; 2d, That defendants had acquiesced in the entry as made, and were estopped to claim title to the other tract.

BUT PER NAPTON AND NORTON, JJ., DISSENTING.

Held, that the question which tract defendants' grantor had in fact entered, was a judicial question: that the decision of the land officers of the government and the issuing to him of the patent for the other tract was not conclusive on him or his grantees, and that plaintiff took the title as trustee for them. *Sensenderfer v. Smith*, 80.

2. REMOVING CLOUD ON LAND TITLES. A suit to remove a cloud upon the title to land cannot be maintained by one not in actual possession of the land, nor where the evidence preponderates against the plaintiff's claim of title. *Keane v. Kyne*, 216.

3. POWER OF A COURT OF EQUITY TO REFORM CONTRACTS. A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake, in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo*; as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.

4. EQUITY PRACTICE: VENDOR'S LIEN: CROSS-BILL: HARMLESS ERROR OF TRIAL COURT. In a suit to enforce a vendor's lien, the answer, after denying the alleged indebtedness, pleaded specially that plaintiff agreed to receive lands in Kansas as part payment of the purchase money, tendered a deed, and prayed specific performance. The reply admitted a contract for purchase of the Kansas lands, but charged that this was a separate transaction, having no connection with the first. On this issue the trial court found for the plaintiff; in which finding this court, upon an examination of the evidence, concurred. The trial court, after all the evidence had been heard, dismissed that portion of the answer pleading the contract to pay in lands, treating it as a cross-bill; *Held*, that this was error; that this portion of the answer was pleaded as a part of the main transaction, and as a defense to plaintiff's action, and that the prayer for specific performance of that contract was in substance a prayer that the court would effectuate the main contract of the parties, as understood by defendant, and, as such, that there was no necessity for the dismissal; but, as the judgment would have been the same, whether this portion of the answer were dismissed or not, there was no such error as would justify a reversal of the judgment. *Olney v. Eaton*, 563.

5. SPECIFIC PERFORMANCE. The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Ib.*

6. EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING. An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the settlement, of the facts on which he bases his claim to relief; and this is true although that defense is not set up in the answer. *Quinlan v. Keiser*, 603.

7. EJECTMENT: VOID ADMINISTRATOR'S DEED: EQUITY: PLEADING. When a defendant in ejectment, holding under a deed made by the administrator of plaintiff's ancestor, admits that the deed does not convey the legal title, he cannot bar the plaintiff's recovery by showing that he paid the purchase money, that the administrator applied it in payment of the debts of the estate, and that he has since paid the taxes and made lasting improvements on the land; but these facts entitle him to have an account taken, and to have the sum found to be due him declared a lien upon the land.

An answer setting up this defense and not praying such relief, is defective. *Sims v. Gray*, 613.

See County Bonds.

ESTOPPEL.

1. Estoppel by plea: husband and wife. A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land, given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than as tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon a trial, the plea may have been found in his favor. *Chapman, Admr. v. Callahan*, 299.

2. Husband and wife: estoppel. Acts of a husband in respect of the lands of his wife not held as her separate estate, cannot operate an estoppel upon her. *Hall v. Callahan*, 316.

See Deed of Trust, 8.

Fraud, 1.

License, 1. 2.

Notice, 2.

Schools, 2.

Taxes and Taxation, 5.

ESTRAYS.

See Fences, 1, 2.

EVIDENCE.

1. Murder: the bones of the dead man may be exhibited in evidence upon a trial for murder, for the purpose of showing to the jury the attitudes and relative positions of the deceased and defendant, when the fatal shot was fired. *State v. Wieners*, 13.

2. Evidence, parol: records. Parol evidence, in order to overcome record evidence, should be of the most unquestionable and conclusive character. *Sensenderfer v. Smith*, 80.

3. Evidence of threats. Upon a trial for murder, evidence of threats made by deceased against defendant, is not admissible to justify the killing, but is admissible as conducing to show that an

assault was first made by deceased upon defendant, when there is other evidence tending to prove such assault. When there is none such, evidence of threats is not admissible for any purpose. *State v. Alexander*, 148 ; *State v. Lee*, 165.

4. EVIDENCE OF CHARACTER. The good character of the accused is an ingredient to be submitted to the jury like any other fact, and evidence to prove good character is admissible in every criminal case. If the jury believe the accused to be guilty, they must not acquit him because he has borne a good character; and on the other hand if all the other evidence, taken by itself proves him guilty, they must not, for that reason, fail to consider the evidence of character. *State v. Alexander*, 148.

5. EVIDENCE: CRIMINAL PRACTICE. The written report of the testimony of a witness taken before a committing magistrate, is not admissible as evidence on a criminal trial at which the witness is present and testifies, when not offered either to impeach the witness or to refresh his memory, but as independent testimony. *State v. Lee*, 165.

6. DECLARATIONS BY A WIFE, NOT EVIDENCE AGAINST HER HUSBAND. A proposal to have a criminal charge hushed up made by the wife of the accused, in his absence, is not admissible in evidence against him upon a trial for the alleged offense. *State v. Jaeger*, 173.

7. CRIMINAL LAW: EVIDENCE. Upon the trial of a criminal case, proof that, since the finding of the indictment, defendant was arrested in a distant State on another indictment, and that he attempted to escape, is inadmissible.

For the purpose of showing that he has attempted to avoid the prosecution, the indictment, on which he is being tried, may be read in evidence in connection with proof that he has previously forfeited his recognizance and left the State. But the court should instruct the jury that it is admissible as evidence for this purpose only, and should not leave them to infer that in determining the guilt or innocence of defendant, they have a right to consider the fact that the grand jury has indicted him for the crime. *State v. Hart*, 208.

8. UPON a trial for a felonious assault, evidence that the person alleged to have been assaulted by defendant, was on the same day assaulted by others, and was subsequently killed, is inadmissible. *Ib.*

9. CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING. Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.

10. PRIMA FACIE CASE. In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant; it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts; it is not necessary that plaintiff, in the first place

and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Ib.*

11. SCOPE OF AGENCY: HOW SHOWN. The authority of an agent to act in a given manner, may be inferred from the mere fact and the nature of his employment, or from long continued and repeated acts of acquiescence by his employer. *Edwards v. Thomas*, 468.

12. STATEMENTS OF AGENT. Third persons have a right to rely upon the statements of an agent as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge. *Ib.*

13. WILL: DECLARATIONS OF A TESTATOR made after the execution of his will, tending to show that it was not satisfactory to him, and that he had made, or would make other dispositions of his property, are not admissible in evidence for the purpose of impeaching the will, (*following Gibson v. Gibson*, 24 *Mo.* 227, *and Cawthorn v. Haynes*, *Ib.* 237). *Spoonemore v. Cables*, 579.

14. EVIDENCE OF CHARACTER. When a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588

15. COMPLAINTS OF PHYSICAL PAIN made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury. *Ib.*

16. TESTIMONY FALSE IN PART: PROVINCE OF THE JURY. If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Ib.*

17. DEED: COPY AS EVIDENCE. A certified copy of an administrator's deed is not admissible in evidence, when the original is in the possession of the party offering the copy, although it is not offered as evidence of title, but only for the purpose of proving the sale by the administrator and the purchase by himself. *Sims v. Gray*, 613.

18. LAND SHARK. It is error in an ejectment case to admit evidence that plaintiff is a "land shark." *Sensenderfer v. Neale*, 669.

19. THE RECITALS IN A TRUSTEE'S DEED purporting to be executed in pursuance of a power of sale given by a deed of trust, are of themselves, no evidence of the facts stated, unless made so by express provision of the deed of trust, (*following Neilson v. Charlton Co.*, 60 *Mo.* 386; *Vail v. Jacobs*, 62 *Mo.* 130.) *Hancock v. Whybark*, 672.

20. TRUSTEE'S AFFIDAVIT OF NOTICE: ADVERTISEMENT. The affidavit of a trustee in a deed of trust showing compliance with a requirement of the deed that he should give notice of sale by posting an advertisement in ten public places before proceeding to sell under it, is not admissible in evidence as a publisher's affidavit within the

meaning of section 7, p. 125, Wag. Stat. He must be introduced as a witness to prove the fact. *Ib.*

21. DEED OF TRUST: EVIDENCE: ESTOPPEL. Evidence showing that the power of sale was extinguished by payment of the debt, before the sale under the deed of trust, is admissible where the purchaser at such sale is the *cestui que trust*, and is seeking to recover possession of the property purchased from the grantor in the deed of trust. But, evidence of facts constituting an estoppel against the grantor from setting up such a defense, is also admissible. *Ib.*

22. DEED OF TRUST: EVIDENCE is admissible to show that a portion of the property seized by the sheriff, under a writ of replevin, as appurtenant to certain personal property conveyed by a deed of trust, was not a part thereof when the deed was executed, and was not included therein. Whether it passed as after acquired property is a question of law for the court on the facts proven. *Ib.*

SEE AUTREFOIS ACQUIT, 1.

CORPORATION, 1, 2.

COUNTY BONDS.

INSURANCE, 2, 3.

LARCENY.

MURDER, 5, 12, 14.

PRACTICE IN SUPREME COURT, 1.

PRINCIPAL AND AGENT, 1.

VARIANCE, 1.

WITNESS, 4.

EXECUTION.

1. CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES. Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.

2. SALE UNDER EXECUTION: SHERIFF'S POWER TO AMEND DEED. When a sheriff has executed a deed in pursuance of a sale under execution, conveying land by the same description by which it was adver-

tised and sold, his power is at an end. He cannot afterwards execute another deed conveying by a different description the land which he intended to sell, and which the bidders at the sale understood was being sold. *Ware v. Johnson*, 662.

EXECUTOR.

See Administration.

FAILURE OF TITLE,

See Rescission, 1, 4.

FEES.

See Clerk's Fees.

FELONY.

Definition of felony: assault with intent to kill. Under the statute defining felony (Wag. Stat., p. 516, Sec. 33), any offense is a felony which is liable to be punished by imprisonment in the penitentiary. The fact that it may also be punished by fine, or by fine and imprisonment in the county jail, does not alter its character, (*following Johnston v. State*, 7 Mo. 183). Assault with intent to kill is a felony. *State v. Green*, 631.

FENCES.

1. Railroad: non-liability for cattle drowned on company's land. The forty-third section of the Railroad Law, (Wag. Stat., p. 310, § 43,) imposes upon a railroad company no liability to the owner of cattle accidently drowned in an unenclosed well situated on the company's right of way, notwithstanding the loss is occasioned by the failure of the company to erect and maintain proper fences as required by that section. *Hughes v. Hannibal & St. Jo. R. R. Co.*, 325.

2. Unenclosed lands: proprietor not liable for accidental injury to cattle coming upon them. The proprietor of unenclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor. *Ib.*

3. Railroad fences: statutes construed. The 43rd section of the railroad law does not require railroad companies to erect and maintain fences within the limits of incorporated towns.

The 5th section of the damage act (Wag. Stat., p. 520), does not require them to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where

there are no fences, but where fences might lawfully have been erected. *Edwards v. Hannibal & St. Joseph R. R. Co.*, 567.

4. RAILROADS: STATUTORY LIABILITY OF, FOR INJURIES TO ANIMALS. No action can be maintained, under the 43rd section of the railroad law (Wag., Stat., p. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been, but might lawfully be erected, the action should be brought under section 5 of the damage act (Wag. Stat., p. 520), which dispenses with the proof of negligence, or, the action should be brought at common law. *Elliott v. Hannibal & St. Joseph R. R. Co.*, 683.

5. WHERE, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under the 5th section of the damage act. *Ib.*

FINANCIAL AGENT.

SEE PRINCIPAL AND AGENT, 3.

FORBEARANCE.

CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION. An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Glasscock v. Glasscock*, 627.

FORCIBLE ENTRY AND DETAINER.

IN JUSTICE'S COURT. A complaint in an action for forcible entry and detainer before a justice of the peace, not verified by affidavit, is insufficient and does not give the justice jurisdiction to try the case. *Fletcher v. Keyte*, 285.

FRAUD.

ESTOPPEL. A relinquishment of title to personal property obtained by imposition, is of no effect, and where such a relinquishment was so obtained from one who had purchased certain mules and wagons, but they were left in his possession, he was not estopped from showing the fraud as against one who subsequently advanced money on the security of the property to the former owner of it, but who neither knew of the relinquishment, nor re-

ceived possession of the property. The doctrine that where one of two innocent parties must suffer, that one must be the sufferer who gave occasion to the wrong, has no application to such a case. *Fletcher v. Drath*, 126.

SEE COUNTY BONDS,

RESCISSION, 1.

STATUTE OF FRAUDS.

FRAUDULENT CONVEYANCE.

1. VENDOR'S LIEN: DEFENSE OF FRAUDULENT CONVEYANCE. To defeat a suit for the enforcement of a vendor's lien against land, which, since the vendor's death, his administrator has sold to pay debts of the estate, the purchaser at the administrator's sale may show that no debt was incurred by the vendee, and for this purpose will be allowed to prove that this deed was made without consideration, and in order to hinder and defraud the creditors of the vendor. *Chapman, Admr. v. Callahan*, 299.

2. FRAUDULENT CONVEYANCE, NOT IMPEACHABLE BY WHOM. A purchaser at administrator's sale cannot impeach a deed made by the administrator's intestate, on the ground that it was made with intent to defraud the creditors of the intestate. *Hall v. Callahan*, 316.

3. A FRAUDULENT CONVEYANCE OF A HOMESTEAD by the head of a family, does not produce a forfeiture of the benefits of the homestead exemption (*following Vogler v. Montgomery*, 54 *Mo.* 577). *The State ex rel. Meinzer v. Diveling* 375.

GARNISHMENT.

EXTENT OF GARNISHEE'S LIABILITY. Process of garnishment can not be made to operate so as to annul the contracts of parties, or to subject a party to recovery by the creditor of his creditor, when the latter could not himself recover. *McPherson v. Atlantic & Pacific Railroad Co.*, 103.

GOVERNOR.

SEE PARDON, 1, 2, 3, 4.

GRAND JURY.

1. GRAND JURY: SHERIFF. It is no ground of exception in a criminal case that the grand jury, by which the defendant was indicted, was not selected in the manner prescribed by law; nor, that the record fails to show that the sheriff and his deputies took the prescribed oath before summoning the grand jury. *State v. Hart*, 208.

2. A GRAND JURY may consist of twelve men. *State v. Green*, 631.

HABEAS CORPUS.

1. CORRECTION OF JUDGMENTS IN CRIMINAL CASES: CONSTITUTIONAL LAW. The act of March 1st, 1877, (Sess. Acts, p. 261,) requiring any court to which application is made by *habeas corpus* for the release of any prisoner confined under a sentence which is erroneous as to time or place, to sentence him to the proper place of imprisonment or for the correct length of time, authorizes the correction of erroneous sentences passed previous to that date, and is not void either as an *ex post facto* law or as retrospective in its operation. *Ex parte Bethurum*, 545.

2. JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES. The foregoing act is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ib.*

HEAT OF PASSION.

SEE MURDER, 1.

HEIR.

SEE LIMITATIONS, 2.

HOMESTEAD.

1. HOMESTEAD LAW: SEC. 7 CONSTRUED. The intent of section 7 of the Homestead Act, (Wag. Stat., p. 698,) is to secure to every head of a family who had an existing estate in lands at the time of the passage of the act a homestead free from the payment of debts contracted after that date, and to secure to every such person subsequently acquiring an estate, a homestead in it free from liability for debts contracted after the date of the filing for record the deed by which the title was acquired.

One who, prior to the passage of the act, had entered government land, received a certificate of entry, and was living with his family upon it, but had never taken out a patent, had an existing estate within the meaning of section 7, so that it could not be taken for a debt subsequently contracted. *The State ex rel. Meinzer v. Diveling*, 375.

2. A FRAUDULENT CONVEYANCE OF A HOMESTEAD by the head of a family, does not produce a forfeiture of the benefits of the homestead exemption, (*following Vogler v. Montgomery*, 54 *Mo.* 577). *Ib.*

HOMICIDE.

See Murder, 9, 11.

HUSBAND AND WIFE.

1. Declarations by a wife, not evidence against her husband. A proposal to have a criminal charge hushed up made by the wife of the accused, in his absence, is not admissible in evidence against him on a trial for the alleged offense. *State v. Jaeger*, 173.

2. Estoppel by plea: husband and wife. A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than a tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon trial, the plea may have been found in his favor. *Chapman, Admr. v. Callahan*, 299.

3. Estoppel. Acts of a husband in respect of the lands of his wife not held as her separate estate, cannot operate an estoppel upon her. *Hall v. Callahan*, 316.

4. What constitutes a valid marriage. An agreement made in 1819 or in 1830, between parties competent to contract, that they would live together as man and wife, followed by actual cohabitation, constituted a valid marriage, without solemnization before a minister of the gospel or an officer of the law. The Territorial Laws of April 24th, 1805 and July 9th, 1806, (Terr. Laws, pp. 66, 83), and the act of the Legislature of January 4th, 1825, (Rev. Stat., 1825, p. 527), concerning marriage, contain no positive declaration that a marriage not solemnized shall be void. *Dyer v. Brannock*, 391.

5. Unlawful marriage: inheritable capacity of issue. Under section 8 p. 328, Rev. Stat. 1825, which provides that the issue of all marriages deemed null in law * * shall, nevertheless, be legitimate, a child of such a marriage will inherit and transmit by descent the same as if born of a lawful marriage. *Ib.*

6. Statute of limitations. As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitation runs from the expiration of his estate and not from her death. *Ib.*

7 A judgment in personam against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm. *Weil v. Simmons*, 617.

See Judgment, 4.

IMPROVEMENTS ON LAND.

See Equity, 7.

INDICTMENT.

1. Criminal law: evidence. Upon the trial of a criminal case, proof that, since the finding of the indictment, defendant was arrested in a distant State on another indictment, and that he attempted to escape, is inadmissible.

For the purpose of showing that he has attempted to avoid the prosecution, the indictment, on which he is being tried, may be read in evidence in connection with proof that he has previously forfeited his recognizance and left the State. But the court should instruct the jury that it is admissible as evidence for this purpose only, and should not leave them to infer that in determining the guilt or innocence of defendant, they have a right to consider the fact that the grand jury has indicted him for the crime. *State v. Hart*, 208.

2. The averments contained in the indictment itself, determine its sufficiency; not those that may be found in the copy furnished the defendant. *State v. Green*, 631.

3. Right to true copy of: when waived. The defendant has, under our statute, a right to a true copy of the indictment, 48 hours before the trial, and, if an incorrect copy is furnished, he has the right to demand a true copy, and delay the trial until it is furnished; but, if he pleads without such copy, and makes no objection for want of it, he cannot after verdict, on that account, claim a new trial. *Lisle v. State*, 6 Mo. 428, *followed*. *Ib.*

INFANT.

1. Liability for torts. An infant is liable for a tort in the same manner as an adult. *Conway v. Reed*, 346.

2. Ratification of infant's contract. The validity of a promise by an adult to pay a debt incurred by him during his minority, is not affected by the fact that at the time of making the promise he believed himself legally liable to pay the debt, or by the fact that during his minority his curator kept him supplied with all necessaries. *Ring v. Jamison, Admr.*, 424.

INSTRUCTIONS.

1. An instruction is erroneous which assumes as a fact that which is in issue, and which the jury are required to pass upon. *Peck v. Ritchey*, 114.

2. Remarks of judge in presence of jury. When illegal evidence has been admitted without objection, a remark made by the trial judge in the presence of the jury that if objection had been

made he would have excluded it, cannot be assigned for error. *Nelson v. Foster*, 381.

3. HARMLESS ERROR. The Supreme Court will not reverse a judgment for a faulty instruction given by the trial court, when other instructions were given which presented the case to the jury fully and fairly, and upon the facts as clearly proven the verdict was manifestly for the right party. *Ib.*

4. WHERE the instructions given fully embrace all that is contained in those that are refused, this court will not reverse the judgment because of such refusal. *Graham v. Pacific Railroad Co.*, 536.

SEE MURDER, 2, 6.

WILLS, 3, 4.

INSURANCE.

1. LIMITATION AS TO TIME OF BRINGING SUIT. The charter of an insurance company required all suits to be brought on policies issued by the company within twelve months from the date of loss. A policy issued to the plaintiff contained a stipulation that it was made and accepted subject to the charter, and also provided that no suit or action for the recovery of any claim by virtue of the policy should be sustained in any court, unless commenced within twelve months after the loss should occur, and should any suit or action be commenced after the expiration of twelve months, the lapse of time should be taken and deemed as conclusive evidence against the validity of the claim, any statute of limitation to contrary notwithstanding. Plaintiff brought suit on the policy more than twelve months after a loss had occurred; *Held*, that the above stipulation was operative and binding, and precluded the plaintiff from maintaining his suit. *Glass v. Walker, Assignee, &c.*, 32.

2. INSURABLE INTEREST: UNCLE AND NEPHEW. A policy of insurance procured by one upon the life of another, for the benefit of the former, who has no pecuniary interest in the continuance of the life insured, is against public policy and void. The mere relation of uncle and nephew does not constitute an insurable interest, to enable either to insure the life of the other; *Held*, therefore, where an uncle insured the life of his nephew for his own benefit without having any pecuniary interest in his life, that the policy was void.

The burden of proving an insurable interest in the life of the assured lies upon him who claims the insurance. *Singleton v. St. Louis Mut. Ins. Co.*, 63.

3. LIFE INSURANCE: EVIDENCE: SPITTING OF BLOOD. In a suit upon a policy of insurance procured by one upon the life of another, for the purpose of showing what was the condition of the latter, when he made his application for insurance, statements made by him which were expressions of his feelings at the time are admissible in evidence, provided they were not made too long before the application to throw light upon the subject. But such statements of his as may have related to prior ill health, are not admissible.

Parol evidence is admissible to show in what sense the term "spitting of blood" is used in an application for life insurance. *Ib.*

INTEREST.

WHERE a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent.; *Held*, that after the expiration of the extended time the note would bear interest at the rate of ten per cent. *North v. Walker*, 453.

JEOFAILS.

A JUDGMENT AGAINST A MARRIED WOMAN: UNDER THE STATUTE OF AMENDMENTS AND JEOFAILS (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20), a judgment at law against several defendants, one of whom appears by the record to be a married woman, may, in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

PER HOUGH, J., DISSENTING.

SUCH a judgment is a mistake of law, and is erroneous, and can only be corrected on appeal or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Weil v. Simmons*, 617.

JUDGMENT.

1. FINAL JUDGMENT: APPEAL. In a suit for dower, a judgment that plaintiff should be endowed of a certain interest in specific real estate during her natural life, and that she should have and recover of defendant her costs, and have execution thereof, is not a final judgment, and from such judgment no appeal will lie. *Strickler v. Tracy*, 465.

2. NO PERSONAL JUDGMENT can be rendered against the owner of real estate for street improvements, made in front of his premises by the city (*following St. Louis v. Allen*, 53 *Mo.* 44). *City of Louisiana v. Miller*, 467.

3. A JUDGMENT IN PERSONAM against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm. *Weil v. Simmons*, 617.

4. A JUDGMENT AGAINST A MARRIED WOMAN: UNDER THE STATUTE OF AMENDMENTS AND JEOFAILS. (Wag. Stat., pp. 1034, 1036, 1037, §§ 6, 19, 20.) A judgment at law against several defendants, one of whom appears by the record to be a married woman, may in furtherance of justice, be amended by the court which rendered it, at a subsequent term, by striking out the name of the married woman and permitting the judgment to stand as against the others.

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be corrected on appeal, or by writ of error; it is not an irregular judgment within the meaning of the statute authorizing judgments to be set aside by the court in which they were rendered for irregularity. *Ib.*

5. FINAL JUDGMENT. A judgment for costs with an order of execution but without other disposition of the case, is not a final judgment, and no writ of error lies from it, (*following Boggess v. Cox*, 48 *Mo.* 278). *Crockett v. Lewis*, 671.

SEE ADMINISTRATION, 10.

APPEAL, 1.

JUDICIAL SALE.

SEE NOTICE, 1.

JURISDICTION.

1. JURISDICTION, AS DETERMINED BY AGGREGATE AMOUNT OF CLAIMS SUED ON. When the jurisdiction of the court depends upon the amount in controversy, and the petition contains separate counts upon numerous special tax bills, the aggregate amount of all the bills is the test for determining the question of jurisdiction. *Hunt v. Hopkins*, 98.

2. EJECTMENT, PRACTICE IN: CHANGE OF VENUE: JURISDICTION. Unless an ejectment case is transferred by a proper order entered of record from the court of the county in which the land lies, no court in any other county can acquire jurisdiction of it; and the question of jurisdiction may be raised for the first time in the Supreme Court. *Bray v. Marshall*, 122.

3, JURISDICTION AND PRACTICE IN SUPREME COURT IN HABEAS CORPUS CASES. The act of March 1st, 1877, (Sess. Acts, p. 261,) is not void as conferring original jurisdiction on the Supreme Court. That court has, under the constitution, original jurisdiction in *habeas corpus* cases, and the act is substantially an amendment to the *habeas corpus* act, prescribing the practice in such cases. *Ex parte Bethurum*, 545.

SEE ADMIEISTRATION, 3.

LIMITATIONS, 5.

JURY.

1. PRACTICE, CRIMINAL: WHAT CONSTITUTES MISCONDUCT OF THE JUDGE AT THE TRIAL: JUROR CANNOT IMPEACH THE VERDICT. After the jury had retired to consider of their verdict in a criminal case, one of their number sent a note to the judge who presided at the trial, asking advice concerning the case, to which the judge made answer in writing. He also held a conversation with a juror as to how the

jury stood upon the question of conviction, and permitted a bailiff to tell him, without rebuke, how they were divided. All these things were done in the absence of the prisoner and his counsel. *Held*, that they constituted a case of misconduct on the part of the judge, which entitled the defendant to a new trial. *Held*, also, that the juror was not a competent witness to impeach the verdict. *State v. Alexander*. 148.

2. TESTIMONY FALSE IN PART: PROVINCE OF THE JURY. If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

SEE GRAND JURY, 1.

PRACTICE, CRIMINAL, 5.

PRACTICE IN SUPREME COURT, 2

WAIVER, 2.

JUSTICE'S COURT.

FORCIBLE ENTRY AND DETAINER. A complaint in an action for forcible entry and detainer before a justice of the peace, not verified by affidavit, is insufficient, and does not give the justice jurisdiction to try the case. *Fletcher v. Keyte*, 285.

LACHES.

1. WHEN a contract has been made between an administrator and a creditor of the estate for the extension of a promissory note executed by the intestate, the creditor is not guilty of laches in not exhibiting and making application for the allowance of his claim against the estate within the term to which the payment has been extended, and the creditor cannot, therefore, invoke against him the statutory bar created by sections 2 and 6, article 4 of Wagner's Statutes. *North v. Walker, Admr.*, 453.

2. EFFECT OF DELAY IN RAISING JURISDICTIONAL QUESTION: STATUTE OF LIMITATIONS. When the defendant has neglected to raise the question whether the trial court had jurisdiction, until a late stage of a prolonged litigation, in the progress of which a judgment against him has been affirmed in the Supreme Court, that court will decline, on a second appeal, to examine the question, if the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations as a bar against plaintiff's demand in a new action. *Boone v. Shackleford*, 493.

LANDS AND LAND TITLES.

1. DEED OF TRUST, POWERS OF GRANTOR IN. One who gives a deed of

trust upon land cannot afterwards make any agreement concerning the same to the prejudice of the title conveyed by the deed. A subsequent contract with a stranger permitting him to inclose and use part of the land, is void as against a purchaser at a sale under the deed of trust. *Sims v. Field*, 111.

2. LAND ENTRIES: RESULTING TRUSTS. If one owning a government land-warrant issued in the name of another, and not assigned by him, enters land under the warrant for himself, but for want of the assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. *Key v. Jennings*, 356.

SEE EQUITY, 1.

LICENSE, 3, 4.

LANDLORD AND TENANT.

CONTRACT: TAXES. Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it; *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes. *McPherson v. Atlantic and Pacific Railroad Co.*, 103.

SEE LICENSE, 3, 4.

LARCENY.

1. REMOVAL OF STOLEN PROPERTY INTO ANOTHER COUNTY. Each asportation of stolen property from one county into another, is a fresh theft. An indictment for stealing a mare in Greene county, therefore, is supported by evidence that she was stolen by defendant in Laclede county, and subsequently carried by him into Greene. *State v. Preston G. Smith*, 61.

2. STATUTES CONSTRUED. By section 25, chapter 201, General Statutes of 1865, the stealing of property of the value of ten dollars or more, constituted grand larceny; and by section 27 the stealing of property under the value of ten dollars, constituted petit larceny. By the act of March 1st, 1877, (Sess. Acts 1877, p. 241,) these sections were amended by raising the value necessary to constitute grand larceny to twenty dollars, and by making the stealing of less than twenty dollars petit larceny. A person indicted for stealing property of the value of ten dollars before the passage of the act of 1877, pleaded guilty after the act took effect, and was sentenced to two years imprisonment in the penitentiary, the penalty prescribed for grand larceny. An act in force at the time the offense was committed, (Wag. Stat., 895, § 6) provided that "no offense committed, and no penalty * * incurred previous to the time when any statutory provision shall be repealed, shall be affected by such repeal; but the trial and punishment of all such offenses and the

recovery of such penalties * * shall be had in all respects as if the provision had remained in force."

Held, 1*st*, That section 6 applies as well to cases where a statute has been amended as where it has been absolutely repealed;

2*nd*, That the act of 1877 is, by its terms, prospective, and does not apply to offenses previously committed;

3*rd*, That the sentence as for grand larceny was therefore proper. *The State ex rel. Houston v. Willis*, 131.

5. AUTREFOIS ACQUIT: LARCENY OF MONEY, NATIONAL BANK NOTES: EVIDENCE. A plea of *autrefois acquit* to an indictment for stealing a national bank note, is sustained by proof of an acquittal upon an indictment for stealing money accompanied by evidence that both indictments were for the same act.

Under Sec. 31, p. 1091, Wag. Stat., evidence of the theft of the note was admissible in support of the indictment for stealing money, (*overruling State v. Kroeger*, 47 *Mo.* 530). *The State v. Moore*, 372.

LEASE.

SEE LICENSE, 4.

MISNOMER, 1.

LEGITIMACY.

SEE DESCENT, 1.

LICENSE.

1. ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE. A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Ib.*

2. IF a railroad company, having built a track upon a street of a city under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Ib.*

3. MINING LICENSE: COVENANTS. An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant

of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant, on the part of the grantor, that the grantee, in respect to his mining privilege, shall be free from the interruptions or claims of others. *Boone v. Stover*, 430.

4. LEASE. Such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land, as would entitle the grantee to maintain ejectment. *Ib.*

LIEN.

SEE EQUITY, .

LIMITATIONS.

1. ADVERSE POSSESSION. When adverse possession is such that it may be presumed that the true owner had knowledge of it, and has acquiesced in it, or, if the indications of the claim and possession are so patent and so open that, if he remained in ignorance, it must have been his own fault, he will be barred, provided that the adverse possession has been continued for the requisite length of time. *Key v. Jennings*, 356.

2. STATUTE OF LIMITATIONS. As against the heir of a married woman whose husband survives her and is entitled to an estate in her lands as tenant by the courtesy, the statute of limitation runs from the expiration of his estate and not from her death. *Dyer v. Brannock*, 391.

3. LIMITATION AGAINST RUNNING ACCOUNT. When it is fairly inferable from the conduct of the parties to a running account while it is accruing, that the whole is to be regarded as one account, none of the items are barred by the statute of limitations, unless all are (*following Madison Coal Co. v. Steamboat Colona*, 36 *Mo.* 446 *and other cases*). *Ring v. Jamison, Admr.*, 424.

4. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.

5. EFFECT OF DELAY IN RAISING JURISDICTIONAL QUESTION: STATUTE OF LIMITATIONS. When the defendant has neglected to raise the question whether the trial court had jurisdiction, until a late stage of a prolonged litigation, in the progress of which a judgment against him has been affirmed in the Supreme Court, that court will decline, on a second appeal, to examine the question, if the result of a ruling adverse to the jurisdiction would be to enable the defendant to interpose the statute of limitations as a bar against plaintiff's demand in a new action. *Boone v. Shackleford*, 493.

SEE ADMINISTRATION, 1.

ATTACHMENT.

INSURANCE, 1.

LOTTERY.

SEE STATE EX REL. ATTORNEY GENERAL V. MILLER. 328.

MALICE.

1. MALICE AFORETHOUGHT. Malice is the intentional doing of a wrongful act without just cause or excuse. As an element of the crime of murder malice aforethought signifies that the homicide has been intentionally committed with malice. *The State v. Wieners*, 13.

2. HOMICIDE WITH A DANGEROUS WEAPON: MALICE: REASONABLE DOUBT. If one intentionally kills another with a dangerous weapon, the law presumes that the killing is malicious, and it devolves upon the slayer to adduce evidence to meet or repel that presumption. If he succeeds in adducing sufficient evidence to create in the minds of the jury a reasonable doubt of his guilt, he is entitled to an acquittal. *The State v. Alexander*, 148.

3. PLEADING MALICE. In a case where malice is the gravamen of the action, the petition will be held bad on demurrer, if the facts as detailed in it show that there was no malice, notwithstanding it contains a general charge that defendant's acts were willful, malicious and oppressive. *Dritt v. Snodgrass*, 286.

SEE SCHOOLS, 1.

MANSLAUGHTER.

SEE MURDER, 8, 17.

NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

MARRIAGE.

SEE HUSBAND AND WIFE.

MARRIED WOMAN.

SEE HUSBAND AND WIFE.

MARSHAL.

SEE OFFICER, 3.

MASTER AND SERVANT.

RAILROAD DAMAGES: PLEADING. A railroad company is not liable under the 5th section of the damage act (Wag. Stat., p. 520), for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes, and outside of the line of his employment.

This defense need not be specially pleaded, but may be given in evidence under the general issue. *Cousins v. Hannibal & St. Joseph R. R. Co.*, 572.

MAXIMS.

SEE CAVEAT EMPTOR.

MINING LICENSE.

1. COVENANTS. An instrument in writing, under seal, granting permission to mine on a certain lot, so long as the grantees do regular mining work on the lot, is a license, and a grant of an incorporeal hereditament, which is not revocable except for breaches thereof by the grantee, and contains, in effect, a covenant, on the part of the grantor, that the grantee, in respect to his mining privilege, shall be free from interruptions or claims of others. *Boone v. Stover*, 430.

2. LEASE. Such an instrument is not a lease, for the reason that it does not pass such an estate in possession in the land, as would entitle the grantee to maintain ejectment. *Ib.*

MISNOMER.

MISNOMER OF INSTRUMENT SUED ON: VARIANCE. In an action for breach of covenant for quiet enjoyment contained in an instrument designated in the petition as a lease, but of whose contents the defendant is fully apprised, if the instrument, when produced on the trial appears to be not a lease but a mining license, an amendment of the petition may properly be made, but there is no such variance between the allegation and the proof as to authorize a non-suit. *Boone v. Stover*, 430.

MISREPRESENTATION.

SEE RESCISSION, 1.

MISSOURI STATE LOTTERY.

SEE STATE EX REL. ATTORNEY GENERAL V. MILLER, 328.

MISTAKE.

POWER OF A COURT OF EQUITY TO REFORM CONTRACTS. A court of equity will order a contract to be reformed so as to make it speak the actual agreement of the parties, when satisfied, that by mistake in reducing it to writing, property has been transferred which it was not the intention of either should be included in the contract—and this in a case where the complainant himself drew the paper. It is immaterial how the mistake happened, whether by a misunderstanding of the meaning of words, or through sheer carelessness. But where it appears that the complainant has been guilty of such breaches of the real contract as substantially to deprive the other party of all its benefits, the reformation will be ordered only on condition that the parties be put, as nearly as may be, in *statu quo;* as by the return of all moneys received by the complainant under the contract. *Cassidy v. Metcalf*, 519.

MUNICIPAL BONDS.

SEE COUNTY BONDS.

MUNICIPAL CORPORATION

1. RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES. Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Atlantic and Pacific R. R. Co. v. City of St. Louis*, 228.

2. ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE. A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Ib.*

3. IF a railroad company, having built a track upon a street of a city under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has

once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Ib.*

4. CONTRACTS OF PUBLIC CORPORATIONS: RATIFICATION OF, BY STATE. The General Assembly, by an act passed in December, 1855, enacted, "that all contracts made by the trustees of the town of New Franklin, for the purpose of raising the amount authorized in the act of incorporation, be, and the same are hereby declared to be legal, and may be carried out according to the true intent and meaning of the parties thereto." At the time of the passage of this act, but two contracts had been made by the trustees, one in 1842, the other in 1849; and long prior to its passage, the contract of 1842 had been declared valid by the judgment of this court; *Held*, that the State, by the act, intended to remove doubts as to the validity of the contract made by the trustees in 1849, and thereby ratified the same; and that a subsequent ratification by the State of a contract made by one of its own agencies is equivalent to a previous authorization. *The State ex rel. Attorney General v. Miller*, 328.

5. ———: ———: VESTED RIGHTS UNDER. Public corporations are the auxiliaries of the State in municipal government, and neither their existence nor their privileges, rest upon anything like a contract between them and the legislature; but, when such a corporation, by authority of the State, contracts with a third person, whereby rights become vested in such person, they cannot be divested by the State; such a contract becomes, *pro hac vice*, the contract of the State, and if imperfectly made, can be validated by it, and, when so validated, cannot be violated by the State. *Ib.*

6. ———: MODIFICATION OF, WHEN VALIDATED BY LEGISLATIVE ACT: SUCH ACT NOT OBNOXIOUS AS A RETROSPECTIVE LAW. The act of 1855 is not obnoxious to the constitutional objection that it is retrospective in its operations; the State, as one of the contracting parties, had the same right to consent to the modification of the contract made in 1849, as it had to confer original authority on the town of New Franklin through its trustees to enter into the contract of 1842. *Ib.*

7. ———: VESTED RIGHTS UNDER: WHEN THEY CANNOT BE DIVESTED BY QUO WARRANTO. When the State, through the agency of a public corporation, makes a contract with a third person, and such contract imposes no obligation upon such person to look to the application of the money to be paid by him under such contract, it cannot, by a proceeding by *quo warranto* forfeit and take away the right of the assignees of such person, because such corporation does not apply the funds realized to the object for which they were intended. *Ib.*

8. STREET IMPROVEMENTS. The engineer of a city which has power by its charter to provide by ordinance for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance. *City of Louisiana v. Miller*, 467.

9. NO PERSONAL JUDGMENT can be rendered against the owner of real estate for street improvements, made in front of his premises by the city, (*following St. Louis v. Allen*, 53 *Mo.* 44.) *Ib.*

10. MUNICIPAL POWER OF TAXATION: UNIFORMITY AND EQUALITY. A city which is authorized by its charter to license, tax and regulate

merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *American Union Express Co. v. City of St. Joseph*, 675.

11. MUNICIPAL TAX ON EXPRESS COMPANIES: ESTOPPEL A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city, is properly collected from the gross earnings without deduction for expenses incurred in conducting the business.

If a part of the gross receipts have been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amounts so paid may not be liable to taxation under the ordinance, yet when they are embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back.

SEE SPECIAL TAXES, 1.

MURDER.

1. MURDER IN THE SECOND DEGREE is the wrongful killing of a human being with malice aforethought, but without deliberation. It is where the intent to kill is, in a heat of passion, executed the instant it is conceived, or before there has been time for the passion to subside.

Heat of Passion. This phrase is here used, not in its technical sense, but to denote a condition of mind contra-distinguished from a cool state of the blood.

Malice aforethought. Malice is the intentional doing of a wrongful act without just cause or excuse. As an element of the crime of murder malice aforethought signifies that the homicide has been intentionally committed with malice.

Deliberation does not mean brooded over, considered, reflected upon for a week, a day or an hour, but it means an intent to kill, executed, not under the influence of a violent passion suddenly aroused, amounting to a temporary dethronement of reason, but in the furtherance of a formed design to gratify a feeling of revenge or to accompiish some other unlawful purpose. *State v. Wieners*, 13.

2. CASE ADJUDGED. It having been clearly proven that defendant killed deceased intentionally, that there was no excuse or justification for the killing, that the provocation given by deceased was slight, and that deceased explained and apologized to defendant for it, it was held that it was not a case requiring instructions to be given to the jury defining murder in the second degree, and there being no complaint against the instructions in regard to murder in the first degree given by the trial court, the judgment of conviction was affirmed. *Ib.*

3. EVIDENCE: THE BONES OF THE DEAD MAN may be exhibited in evidence upon a trial for murder, for the purpose of showing to the

jury the attitudes and relative positions of the deceased and defendant, when the fatal shot was fired.

4. AN INDICTMENT FOR MURDER, which fails to state where or in what year the deceased died, is bad. *State v. Mayfield*, 125.

5. EVIDENCE: RES GESTAE. A homicide occurred about eleven o'clock at night; the testimony of defendant's mother was to the effect that defendant came to the house on the same night between eleven and twelve o'clock, and aroused her from sleep, when she got up and let him in; that he had blood on his face and hands, and told her he had had a difficulty with a student, and had cut him; that he had a knife in his hands with blood on it; except from this testimony, it did not appear how much time had intervened between the cutting and the arrival of defendant at his mother's house, and it did not appear how far she lived from the scene of the homicide; defendant's counsel proposed to identify the knife by the mother, to which the State objected, and the objection was sustained, on the ground that there was no evidence tending to show that the killing was done with the knife proposed to be identified; *Held*, that the objection was properly sustained upon the ground, if no other, that defendant had ample time and opportunity between the occurrence of the difficulty and his arrival at his mother's house to cast away, or conceal the instrument with which the cutting was done, and substitute the knife in question in its stead. *State v. Christian alias White*, 138.

6. HARMLESS ERROR IN INSTRUCTIONS: MURDER. Defendant sustains no injury from erroneous instructions relating to murder in the first degree, where he is only convicted of murder in the second degree; and for the giving of such instructions the judgment will not be reversed. *Ib.*

7. REASONABLE DOUBT. Instructions, relating to the question of reasonable doubt, are objectionable, if the jury are not told what a reasonable doubt is. They are also objectionable, if they instruct the jury that, if they have a reasonable doubt as to the evidence of any fact necessary to make up the offense, they must acquit; the accused is only entitled to an instruction relative to the consequences of a reasonable doubt as to his guilt on the whole evidence in the case, and has no right to select a single material fact, and ask the court to direct the jury that, if they have a doubt as to the existence of such fact, they must acquit. *Ib.*

8. MANSLAUGHTER: AGREED COMBAT: SELF-DEFENSE. When all the facts in the case show that the defendant sought and brought on the difficulty, which resulted in the death of his adversary, he is not entitled to have the court instruct the jury in relation to manslaughter; nor can he avail himself of the right of self defense, however imminent the danger in which he may have found himself in the progress of the affray; and when parties, by mutual understanding, engage in a conflict, and death ensues to either, the slayer will be guilty of murder; and although, when the combat is the immediate consequence of a sudden quarrel, and not an act of deliberation or agreement, the slayer may not be guilty of murder, yet, if he, under color of fighting upon equal terms, uses from the beginning of the contest a deadly weapon, without the knowledge of the other, and kills, or when at the beginning he prepares a

deadly weapon, so as to have the power of using it in some stage of the contest, and does use it, and kills the other party with it, the killing will amount to murder. *Ib.*

9. HOMICIDE WITH A DANGEROUS WEAPON: MALICE: REASONABLE DOUBT. If one intentionally kills another with a dangerous weapon, the law presumes that the killing is malicious, and it devolves upon the slayer to adduce evidence to meet or repel that presumption. If he succeeds in adducing sufficient evidence to create in the minds of the jury a reasonable doubt of his guilt, he is entitled to an acquittal. *State v. Alexander*, 148.

10. INTENTIONAL HOMICIDE: INSTRUCTIONS. Where the uncontradicted evidence shows that a homicide was intentionally committed and the only question in the case is whether the act was done in self-defense or not, it is error for the court to give the jury an instruction based upon the hypothesis of a killing without a design to effect death. *Ib.*

11. EVIDENCE OF THREATS. Upon a trial for murder, evidence of threats made by deceased against defendant, is not admissible to justify the killing, but is admissible as conducing to show that an assault was first made by deceased upon defendant, when there is other evidence tending to prove such assault. When there is none such, evidence of threats is not admissible for any purpose. *Ib.*

12. REASONABLE DOUBT: MURDER. In a criminal prosecution the State must establish the guilt of the accused beyond a reasonable doubt, upon a view of the whole evidence. The case is not divided into two parts, one of guilt asserted by the State, the other of innocence asserted by the accused. There is no shifting of the burden of proof; it remains upon the State throughout the trial. An instruction is, therefore, erroneous which declares that if defendant shot and killed the deceased, the law presumes that it is murder in the second degree, in the absence of proof to the contrary; and it devolves upon the defendant to show, from the evidence in the cause, to the reasonable satisfaction of the jury, that he was guilty of a less crime, or acted in self-defense.

Such an instruction is especially objectionable when the court fails to give the jury a proper instruction as to reasonable doubt. *State v. Wingo*, 181

13. When the evidence for the State, upon a trial for murder, raises the question whether defendant was acting in self-defense when he committed the homicide, it is error to give the jury an unqualified instruction that if he willfully shot and killed deceased, they should find him guilty of murder in the second degree. *Ib.*

14. MURDER OF OFFICER: EVIDENCE. Under an indictment for murder in the ordinary form, proof may be made that the deceased was an officer, regularly appointed and qualified, and that he was acting within his jurisdiction, and in the discharge of his duty when killed. *State v. Green*, 631.

15. KILLING OF OFFICER: OFFENSE AT COMMON LAW, UNDER THE STATUTE. At common law, where an officer, having authority to arrest, whether it be for misdemeanor or felony, and using the proper

means for that purpose, is resisted and killed, it is murder in all who take part in such resistance.

Under the statute, (Wag. Stat., p. 445, Sec. 1,) it is murder in the first degree only when the person whose arrest is attempted, is charged with the commission of a felony. *Ib.*

16. MURDER IN FIRST DEGREE. Willfulness, deliberation and premeditation are not elements necessary to constitute a homicide committed in the perpetration, or attempt to perpetrate a felony, murder in the first degree. *Ib.*

17. MURDER: MANSLAUGHTER: INSTRUCTIONS. Where an officer of the law, provided with a legal warrant of arrest, reads the same to the person whose arrest is ordered, and informs him of the offense with which he is charged, and attempts to execute the warrant in a lawful manner, and, while so doing, is shot down by such person without provocation, either by word or act, and the killing is deliberately and premeditately done; *Held*, not to present a case for instructions in regard to murder in the second degree, nor in regard to manslaughter in any of its degrees. *Ib.*

NEGLIGENCE.

1. CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING. Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true, at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.

2. FORTY-THIRD SECTION OF THE RAILROAD LAW: NEGLIGENCE. In an action under the 43rd section of the railroad law (Wag. Stat., p. 310), there can be no recovery for injuries resulting from the negligent management of a train, (*following Cary v. St. L., K. C. & N. Rwy. Co.*, 60 *Mo.* 209). *Edwards v. Hannibal and St. Joseph R. R. Co.*, 567.

SEE EQUITY, 3.

NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

RAILROAD, 15.

NEGLIGENTLY COMPOUNDING MEDICAL PRESCRIPTION.

AN indictment under Sec. 18, p. 447, Wag. Stat., against a druggist for manslaughter in negligently filling a medical prescription with opium by reason of which the person to whom it was administered died, failed to charge that defendant delivered the medicine to any one to be administered to deceased, or to state what were the ingredients named in the prescription, or the respective quantities of the several ingredients, or by whom the medicine was prescribed; *Held*, that these were essential averments, and without them the indictment was defective. *State v. W. H. Smith*, 92.

NEPHEW AND UNCLE.

See Insurance, 2.

NEW FRANKLIN.

See State ex rel. Attorney General v. Miller, 328.

NON EST FACTUM.

Perjury in making affidavit of non est factum. An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion and is insufficient. *State v. Shanks*, 560.

NORMAL SCHOOL.

See School, 2.

NOTICE.

1. United States internal revenue: collector's notice of sale. When the owner of land, on account of which a United States succession tax has been assessed, resides in the same collection district with the land, but not upon it, a collector's notice of seizure and sale of the same to pay the tax, is not lawfully served upon him by leaving a copy at the domicile on the land. *Peyrie v. Schreiber, et al.*, 38.

2. Purchase with notice: trustee: estoppel. Defendants' grantor entered a tract of government land, and took from the receiver of the local land office a receipt for the purchase money, describing the land. By a mistake of the officer the records of the General Land Office at Washington were made to show an entry of a different tract, and a patent was issued accordingly. The records of the local office were afterwards destroyed by fire. Without taking actual possession defendants' grantor claimed to be the owner of the tract designated in the receipt. Nevertheless, for a period of seventeen years he permitted the other tract to be assessed to him for taxation, and during a part of the time at least, paid the taxes on it. The tract described in the receipt never was assessed to him. Plaintiff knew that defendants' grantor had intended to enter that tract, and that he claimed title to it. Finding, however, that the government records showed it to be vacant and subject to entry, plaintiff purchased and obtained a patent for it in his own name. Neither the defendants nor their grantor ever took any step to have the mistake corrected until after the issue of the patent to plaintiff;

Held. 1st, That these facts were not sufficient to put plaintiff on inquiry, or to affect him with notice of a title in defendants, or to constitute him a trustee for them; 2d, That defendants had acquiesced in the entry as made, and were estopped to claim title to the other tract.

NAPTON AND NORTON, JJ., DISSENTING.

Held, that the question which tract defendants' grantor had in fact entered, was a judicial question. that the decision of the land officers of the government and the issuing to him of the patent for the other tract was not conclusive on him or his grantees, and that plaintiff took the title as trustee for them. *Sensenderfer v. Smith*, 80.

3. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *State v. Green*, 631.

SEE CONSIGNOR AND CONSIGNEE.

DEED OF TRUST, 2, 4, 7.

ELECTION, 1.

PROMISSORY NOTE, 4.

OBTAINING GOODS UNDER FALSE PRETENSES.

1. AN indictment for obtaining goods under false pretenses, alleging several matters, one of which may not be in legal contemplation a false pretense, because it relates to something to be done in the future, is not vitiated thereby, if the others are such false pretenses as our statute contemplates. *State v. Vorback*, 168.

2. An allegation in such an indictment that the person, to whom such false pretenses were made, believing the same, and being deceived thereby, was induced, by reason thereof, to deliver, &c., is sufficient averment that such person believed the false pretenses to be true. *Ib.*

OFFICER.

1. KILLING OF OFFICER: OFFENSE AT COMMON LAW, UNDER THE STATUTE. At common law, where an officer having authority to arrest, whether it be for misdemeanor or felony, and using the proper means for that purpose, is resisted and killed, it is murder in all who take part in such resistance.

Under the statute, (Wag. Stat., p. 445, Sec. 1,) it is murder in the first degree only when the person whose arrest is attempted, is charged with the commission of a felony. *State v. Green*, 631.

2. INDICTMENT FOR MURDER: EVIDENCE. Under an indictment for murder in the ordinary form, proof may be made that the deceased was

an officer, regularly appointed and qualified, and that he was acting within his jurisdiction, and in the discharge of his duty when killed. *Ib.*

3. THE DUTIES OF A DEPUTY MARSHAL being defined by law, he may execute a warrant placed in his hands without special instructions from his principal. *Ib.*

4. ARREST: NOTICE OF OFFICER'S AUTHORITY, WHAT SUFFICIENT. An officer duly appointed and qualified, and authorized by a warrant to arrest any offender, gives sufficient notice of his authority to do so by reading to him the warrant of arrest. *Ib.*

PARDON.

1. PARDON OR COMMUTATION: WHEN EXECUTED, NOT REVOCABLE. A pardon or commutation of sentence takes effect, and the recipient of executive clemency cannot be deprived of its benefits and immunities by a subsequent revocation, when it has been signed by the Executive, properly attested, authenticated by the seal of the State, and delivered either to the recipient, or to some one acting for him, or on his behalf. *Ex parte Reno*, 266.

2. CONSTRUCTIVE DELIVERY OF A PARDON. Delivery of a pardon by the Governor to one suing for the release of a prisoner confined in the State penitentiary, is constructive delivery to the prisoner. *Ib.*

3. PARDON NOT VOID BECAUSE NOT REGISTERED. A pardon or commutation of sentence is not void because there is no entry made of it in the office of the Secretary of State, although he is required by law to keep a register of the official acts of the Governor. *Ib.*

4. CONDITIONAL PARDON. Under the Constitution of 1865, the Governor had power to grant a conditional pardon, but the conditions, to be operative, should appear on the face of the paper. *Ib.*

PARTIES.

1. WHO ARE PROPER PARTIES TO A VENDOR'S LIEN SUIT. An administrator sold and conveyed several parcels of land, part of a larger tract, and received the purchase money for the same. His intestate had previously conveyed the entire tract to another party. In a suit by the administrator to enforce a vendor's lien against the entire tract for the purchase money due upon this sale; *Held*, that the purchasers at the administration sale were proper parties defendant. *Chapman, Admr. v. Callahan*, 299.

2. INCOMPETENCY OF A SURVIVING PARTY AS A WITNESS. Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other is not a competent witness, even for the purpose of rebutting testimony given by the adverse party to show admissions made by himself since the death of the deceased. *Ring v. Jamison, Admr.*, 424.

3. PRACTICE: NEW PARTIES. An objection to the action of the trial

court admitting a new party to a suit comes too late, if made for the first time when the case has reached the Supreme Court. *Weil v. Simmons*, 617.

PARTNERSHIP.

1. DEATH OF PARTNER. Death, ordinarily, accomplishes the dissolution of a partnership; but it is otherwise when there is an express stipulation to the contrary in the articles of copartnership. *Edwards v. Thomas*, 468.

2. AGENCY: POWERS OF CASHIER AND FINANCIAL AGENT. One who is authorized to act as cashier and financial agent of a firm which is in the habit of taking commercial paper in the transaction of its business, has authority to endorse such paper in the name of the firm. *Ib.*

3. NOTICE OF PROTEST. It is the duty of the holder of dishonored paper to direct the notary where and to whom to send notice of protest; and if one holding such paper endorsed by a firm, knows that the former manager of the business of the firm has been displaced by another, but fails to inform the notary of the change, and the notary gives notice of protest to the former manager at the old place of business, as he had done on a previous occasion, such notice is insufficient to bind the firm, notwithstanding the failure of the new manager to give notice that the business of the firm is no longer conducted at that place, and to remove the old sign of the firm. *Ib.*

4. DISTRIBUTION OF PARTNERSHIP ASSETS. A partner sold his interest in the firm to his co-partner, who agreed to pay the firm debts. The firm was at the time insolvent. After the sale the continuing partner gave a deed of trust on all the assets of the late firm to secure the payment of an individual indebtedness of his own, which accrued prior to the dissolution. In a contest between a creditor of the firm and the individual creditor, *Held*, that the right of the former to be paid out of the firm assets in preference to the latter was not impaired by the dissolution, and as against him the deed of trust was a nullity. *Phelps v. McNeely*, 554.

5. EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING. An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the settlement, of the facts on which he bases his claim to relief; and this is true although that defense is not set up in the answer. *Quinlan v. Keiser*, 603.

6. A JUDGMENT IN PERSONAM against a married woman, is a nullity; and this is true though she is sued as member of a mercantile firm. *Weil v. Simmons*, 617.

PAYMENT.

SEE CONTRACT, 9.

PERJURY.

PERJURY IN MAKING AFFIDAVIT OF NON EST FACTUM. An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion, and is insufficient. *The State v. Shanks*, 560.

PERSONAL INJURIES.

1. PRIMA FACIE CASE. In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant, it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts, it is not necessary that plaintiff, in the first place and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Conway v. Reed*, 346.

2. DISEASE AS AFFECTING LIABILITY FOR PERSONAL INJURIES. The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

3. EVIDENCE: COMPLAINTS OF PHYSICAL PAIN made by one suffering from a recent injury, are admissible in evidence on behalf of the sufferer in an action to recover damages for the injury. *Ib.*

PERSONAL PROPERTY.

CAVEAT EMPTOR; APPLICABLE WHERE PERSONAL PROPERTY IS NOT IN POSSESSION OF THE PARTY CLAIMING SAME. The doctrine of *caveat emptor* applies to one advancing money and taking a deed of trust upon personal property not in the possession of the grantor in the deed of trust, but in the possession of a third party. *Fletcher v. Drath*, 126.

PLEADING.

1. PLEADING MALICE. In a case where malice is the gravamen of the action, the petition will be held bad on demurrer, if the facts as detailed in it show that there was no malice, notwithstanding it contains a general charge that defendant's acts were willful, malicious and oppressive. *Dritt v. Snodgrass*, 286.

2. EQUITY JURISDICTION TO OPEN SETTLEMENTS: PLEADING. An action to open a settlement of joint account transactions cannot be maintained, if it appears that the plaintiff was aware, when he made the

settlement, of the facts on which he bases his claim to relief; and this is true although the defense is not set up in the answer. *Quinlan v. Keiser*, 603.

3. PLEADING CONSIDERATION OF A NOTE. In declaring upon a written promise to pay money, it is not necessary to aver a consideration for the promise, but if one be averred, it must be a good consideration; otherwise the petition will be demurrable. *Glasscock v. Glasscock*, 627.

4. CONTRACT FOR FORBEARANCE: PLEADING CONSIDERATION. An agreement to give a debtor further time in which to make payment is an agreement for forbearance for a reasonable time.

In declaring upon a written promise to pay money made on the consideration of such an agreement, while it is not necessary to plead the consideration, yet if it is pleaded, the petition should state the time of forbearance actually extended. It is not sufficient to state that the creditor gave his debtor further time in which to pay, and did then forbear to enforce payment. *Ib.*

SEE EQUITY, 7.

ESTOPPEL, 1.

FORCIBLE ENTRY AND DETAINER.

JURISDICTION, 1.

MALICE, 3.

MASTER AND SERVANT, 1.

MISNOMER, 1.

SPECIAL TAXES, 1.

VENDOR'S LIEN, 2, 4.

PLEADING, CRIMINAL.

1. OBTAINING GOODS UNDER FALSE PRETENSES. An indictment for obtaining goods under false pretenses, alleging several matters, one of which may not be in legal contemplation a false pretense, because it relates to something to be done in the future, is not vitiated thereby, if the others are such false pretenses as our statute contemplates.

An allegation in such an indictment that the person to whom such false pretenses were made, believing the same, and being deceived thereby, was induced, by reason thereof, to deliver, &c., is a sufficient averment that such person believed the false pretenses to be true. *The State v. Vorback*, 168.

2. INDICTMENT, CAPTION OF. An objection to an indictment that it purports to have been found in a court which never existed, based solely upon the name given to the court in the caption of the indictment, will not be regarded, where the record shows that the

indictment was returned to a court of whose existence judicial notice can be taken. *State v. Daniels*, 192.

3. PERJURY IN MAKING AFFIDAVIT OF NON EST FACTUM. An indictment for perjury, charged to have been committed by defendant in making an affidavit denying the execution of a promissory note in a suit wherein he was sued upon the note, is bad, unless it shows that an issue of *non est factum* was raised by answer. An averment that defendant made the execution of the note a material issue, or that it then and there became material to inquire and ascertain whether he did execute it only states a legal conclusion and is insufficient. *The State v. Shanks*, 560.

4. INDICTMENT: SUFFICIENCY OF. The averments contained in the indictment itself, determine its sufficiency; not those that may be found in the copy furnished the defendant. *State v. Green*, 631.

SEE MURDER, 4.

NEGLIGENTLY COMPOUNDING MEDICAL RESCRIPTION.

POOR PERSON.

SEE PRACTICE, 6.

POWERS.

EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.

PRACTICE.

1. REMARKS OF JUDGE IN PRESENCE OF JURY. When illegal evidence has been admitted without objection, a remark made by the trial judge in the presence of the jury that if objection had been made he would have excluded it, cannot be assigned for error. *Nelson v. Foster*, 381.

2. DAMAGES: WHEN NOT SO EXCESSIVE AS TO AUTHORIZE REVERSAL. A judgment will not be disturbed on the ground of excessive damages, where the right to recover damages was clearly established, and it does not appear that the sum assessed is so disproportionate to the injury as to bear marks of passion, prejudice or corruption on the part of the jury. *Graham v. Pacific R. R. Co.*, 536.

3. EQUITY PRACTICE: VENDOR'S LIEN: CROSS-BILL: HARMLESS ERROR OF TRIAL COURT. In a suit to enforce a vendor's lien, the answer, after denying the alleged indebtedness, pleaded specially that plaintiff agreed to receive lands in Kansas as part payment of the purchase

money, tendered a deed, and prayed specific performance. The reply admitted a contract for purchase of the Kansas lands, but charged that this was a separate transaction, having no connection with the first. On this issue the trial court found for the plaintiff; in which finding this court, upon an examination of the evidence, concurred. The trial court, after all the evidence had been heard, dismissed that portion of the answer pleading the contract to pay in lands, treating it as a cross-bill; *Held*, that this was error; that this portion of the answer was pleaded as a part of the main transaction, and as a defense to plaintiff's action, and that the prayer for specific performance of that contract was in substance a prayer that the court would effectuate the main contract of the parties, as understood by defendant, and, as such, that there was no necessity for the dismissal; but, as the judgment would have been the same, whether this portion of the answer were dismissed or not, there was no such error as would justify a reversal of the judgment. *Olney v. Eaton*, 563.

4. EVIDENCE OF CHARACTER. When a witness has testified that the character of another witness for truth and veracity is bad, it is discretionary with the trial court to admit or reject further testimony from the same witness to prove his general moral character also to be bad. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

5. ADDRESS TO THE JURY. The court again condemns the conduct of attorneys who travel out of the record in addressing the jury, and make statements of fact which there is no evidence tending to prove. *Ib.*

6. POOR PERSON: SECURITY FOR COSTS. An order, allowing the plaintiff to sue as a poor person, is, in effect, revoked by a subsequent order requiring him to give security for costs, and the absence of a formal order of revocation is not such an irregularity as will justify an appellate court in reversing the judgment of dismissal by the trial court for failure to furnish such security. *Kelty v. Valle*, 601.

SEE LACHES. 2.

MASTER AND SERVANT, 1.

PARTIES, 3.

PRACTICE, CRIMINAL.

1. CONDUCT OF PROSECUTING ATTORNEY. Neither the act of the prosecuting attorney in conferring with a witness for the defense, in relation to the case, nor his statement in argument to the jury that the murder was admitted by defendant were held, in the present case, sufficient to justify a reversal of the judgment. *The State v. Wieners*, 13.

2. WHAT CONSTITUTES MISCONDUCT OF THE JUDGE AT THE TRIAL: JUROR CANNOT IMPEACH THE VERDICT. After the jury had retired to consider of their verdict in a criminal case, one of their number sent a note to the judge who presided at the trial, asking advice concerning the case, to which the judge made answer in writing. He also held a conversation with a juror as to how the jury stood upon

the question of conviction, and permitted a bailiff to tell him, without rebuke, how they were divided. All these things were done in the absence of the prisoner and his counsel. *Held*, that they constituted a case of misconduct on the part of the judge, which entitled the defendant to a new trial. *Held*, also, that the juror was not a competent witness to impeach the verdict. *State v. Alexander*, 148.

3. ATTORNEY'S ARGUMENT. A court should not permit an attorney, either in a civil or criminal case, to state in his argument to the jury material facts of which no evidence has been given. *The State v. Lee*, 165.

4. INDICTMENT CONTAINING SEVERAL COUNTS: MOTION TO COMPEL THE STATE TO ELECT. When there are several counts in an indictment, a motion to compel the State to elect on which count the case shall be tried, is addressed to the sound discretion of the trial court, and the Supreme Court will not interfere with its ruling, unless it is clear that the discretion has been abused to the injury of the accused. *State v. Green*, 631.

4.* THANKSGIVING DAY: SUNDAY: COMPUTATION OF TIME. Thanksgiving day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors; in computing statute time, Sunday itself should be counted unless expressly excepted. *Ib.*

6 JURY: WAIVER OF FULL PANEL. A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, *quaere? The State v. Davis*, 684.

SEE WAIVER, 1.

PRACTICE IN THE SUPREME COURT.

1. EVIDENCE. A judgment will not be reversed because of the admission of improper evidence upon the trial, where it was introduced and read without objection; nor where, if reversed, the evidence would be competent upon a subsequent trial. *Wayne County v. St. Louis & Iron Mountain R. R.*, 77.

2. BILL OF EXCEPTIONS. The Supreme Court will not consider objections to the competency of a juror, when the only evidence impeaching him consists of an affidavit attached to the record, but not copied in the bill of exceptions, or otherwise shown to have been before the trial court, when the question of competency was presented to that court. *The State v. Treace*, 124.

SEE HABEAS CORPUS, 2.

JURISDICTION, 2

...ACHES, 2.

PRESUMPTION.

SEE COUNTY BONDS, 1.

PRINCIPAL AND AGENT.

1. EVIDENCE: DECLARATIONS OF AGENT. Declarations of a person assuming to act as agent of another, are not admissible in evidence to prove his agency, but, after a *prima facie* case of agency is proven against the principal, declarations made by the agent in the prosecution of and relative to the business contemplated by such agency, are admissible against the principal; declarations, however, made to third parties, by the person alleged to be an agent, tending to disprove the fact of such agency, are not admissible in favor of the person alleged to be his principal. *Peck v. Ritchey*, 114.

2. WITHIN WHAT TIME REPUDIATION OF UNAUTHORIZED ACTS OF AGENT MUST BE MADE. An instruction that the principal, wishing to repudiate the unauthorized acts of one assuming to act as his agent, should do so upon learning the fact, or, certainly, within a few days, was held to be erroneous, and that the words "within a reasonable time," or "as soon thereafter as he can," or equivalent words, should have been substituted for "within a few days." *Ib.*

3. POWERS OF CASHIER AND FINANCIAL AGENT. One who is authorized to act as cashier and financial agent of a firm which is in the habit of taking commercial paper in the transaction of its business, has authority to indorse such paper in the name of the firm. *Edwards v. Thomas*, 468.

4. SCOPE OF AGENCY: HOW SHOWN. The authority of an agent to act in a given manner, may be inferred from the mere fact and the nature of his employment, or from long continued and repeated acts of acquiescence by his employer. *Ib.*

5. STATEMENTS OF AGENT. Third persons have a right to rely upon the statements of an agent as to the existence of such extrinsic matters relating to his agency as lie within his own peculiar knowledge. *Ib.*

6. UNAUTHORIZED ACCOMMODATION PAPER: RIGHTS OF PURCHASER: NOTICE. As against a purchaser of negotiable paper endorsed by an agent in the name of his principal, it is no defense that the endorsement was made, not for the benefit of the principal but for the accommodation of a third party, unless the purchaser took with notice of that fact. Positive and direct testimony is not necessary to charge him with notice; it may be inferred from facts proven; but mere circumstances sufficient to put a prudent man on inquiry will not do. The fact that the name of the party accommodated appears or

the paper as last endorser does not, as matter of law, impart such notice. *Ib.*

SEE RAILROADS, 17.

PRINCIPAL AND SURETY.

1. SUBROGATION: RIGHTS OF SURETIES ON AN ADMINISTRATOR'S BOND WHO HAVE PAID DEBTS OF THE ESTATE. An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and *it was Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Wernecke v. Kenyon's Admr.*, 275.

2. EXECUTOR'S FINAL SETTLEMENT CONCLUSIVE ON HIS SURETIES. An order of the probate court made upon a final settlement, ascertaining a balance to be due from an executor and directing him to pay it over, is conclusive against his sureties in an action on his bond, (*following State v. Holt*, 27 Mo. 340; *State v. Rucker*, 59 Mo. 17); *Dix v. Morris*, 514

PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY.

1. This court was not abolished by the constitution of 1875. *State v. Hart*, 208.

2. ON APPEAL FROM THE PROBATE AND COMMON PLEAS COURT OF GREENE COUNTY, the circuit court can try a case only as an appellate court, upon errors assigned, and not *de novo*, (*following McCraw v. Habble*, 61 *Mo.* 107.) *Boone's Admr. v. Shackleford's Admr.*, 493.

PROBATE JURISDICTION.

STATUTE CONSTRUED. In a county in which a probate court is established, having by statute exclusive original jurisdiction "to hear and determine all suits and other proceedings instituted against executors or administrators upon any demand against the estate of their testator, or intestate," the circuit court has no jurisdiction to enter a money judgment against the estate of a deceased person, or to charge the lands of the estate with the payment of such judgment. *Wernecke v. Kenyon*, 275.

PROMISSORY NOTE.

1. POWER OF ADMINISTRATOR TO OBTAIN EXTENSION OF NOTES. An administrator has the legal power to contract for the extension of the time of payment of a note executed by his testator, so long as it is not barred under the administration law. *North v. Walker's Admr.*, 453.

2. INTEREST. Where a note called for ten per cent. interest after maturity, and the time of payment was extended by agreement for a certain time at the rate of nine per cent.; *Held*, that after the expiration of the extended time the note would bear interest at the rate of ten per cent. *Ib.*

3. UNAUTHORIZED ACCOMMODATION PAPER: RIGHTS OF PURCHASER: NOTICE. As against a purchaser of negotiable paper endorsed by an agent in the name of his principal, it is no defense that the endorsement was made, not for the benefit of the principal, but for the accommodation of a third party, unless the purchaser took with notice of that fact. Positive and direct testimony is not necessary to charge him with notice; it may be inferred from facts proven; but mere circumstances sufficient to put a prudent man on inquiry will not do. The fact that the name of the party accommodated appears on the paper as last endorser does not, as matter of law, impart such notice. *Edwards v. Thomas*, 468.

4. NOTICE OF PROTEST. It is the duty of the holder of dishonored paper to direct the notary where and to whom to send notice of protest; and if one holding such paper endorsed by a firm, knows that the former manager of the business of the firm has been displaced by another, but fails to inform the notary of the change, and the notary gives notice of protest to the former manager at the old place of business, as he had done on a previous occasion, such notice is insufficient to bind the firm, notwithstanding the failure of the new manager to give notice that the business of the firm is no longer conducted at that place, and to remove the old sign of the firm. *Ib.*

SEE CONSIDERATION, 1, 2.

CONTRACT, 9.

COUNTY BONDS.

PERJURY.

PRINCIPAL AND AGENT, 3.

PROTEST.

SEE PROMISSORY NOTE, 4.

PURCHASER WITH NOTICE.

SEE NOTICE, 2.

PROMISSORY NOTE, 3.

RAILROAD.

1. RAILROAD CONSOLIDATION: STATUTE CONSTRUED. The act of March 15th, 1871, (Sess. Acts, p. 66,) left it optional with the Atlantic & Pacific Railroad Company, and the South Pacific Railroad Company, to consolidate, or not, as they chose. Failure of the companies to file with the Secretary of State the certificate required by the second section of that act, did not affect the validity of the conveyance by which, before the passage of the act, the South Pacific Company transferred to the other all its property, rights and franchises. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

2. RIGHT OF INDIVIDUALS AND THE STATE TO DISPUTE THE EXERCISE OF CORPORATE FRANCHISES. Individuals may resist the condemnation of their lands for a right of way for a railroad, after the expiration of the time given by the charter of the company for the completion of the road, but cannot interfere to prevent the company extending its road after the expiration of that time, over a right of way already acquired; and a city is an individual within the meaning of this rule, so that where a railroad company is, by its charter, authorized to build its road along or across the streets of any city or town, a city cannot prevent it from making an extension or building a branch road over one of its streets, on the ground that the time limited by charter for the completion of the road has expired. The State alone can proceed against the company to arrest the work on that ground. *Ib.*

3. BRANCH RAILROADS: CHARTER LIMITATIONS AS TO TIME OF BUILDING. A railroad company was authorized, by its charter, to build a main line and branches, and was required to complete its road within seventeen years from the date of the charter; *Held*, that this limitation did not apply to the building of branch roads, at least so as to prevent the company from building a branch road over a right of way acquired before the expiration of that period. *Ib.*

4. BRANCH RAILROADS. A railroad company having a power to build branches, may, under that power, build a line commencing near one of its termini, and running in the same general direction with the main line, so as to form practically an extension of the main line. *Ib.*

5. ESTOPPEL AGAINST EXERCISE OF CORPORATE POWERS: MUNICIPAL POWER OVER STREETS: LICENSE. A railroad company which has, by its charter, a general power to build its road along or across the streets of a city, is not estopped from asserting the power to build on a particular street by the fact that it has once solicited and obtained from the city authorities, an ordinance permitting it to lay and use a track on that street for a limited time, and has actually laid and used it, as permitted by the ordinance. The city has no power to authorize the use of any street for a railroad. Such an ordinance is, therefore a nullity, and cannot create between the city and the company the relation of licensor and licensee, so as to make the company's action amount to an acceptance of a license. *Ib.*

6. IF a railroad company, having built a track upon a street of a city

under a license from the city, subsequently tears up the track and surrenders possession of the street to the city, the fact that it has once accepted such license will not estop it from asserting a power to build on that street, which was given by its charter, and was in existence when it accepted the license. *Ib.*

7. RAILROADS: ACCEPTANCE OF STATUTORY PRIVILEGES. An act passed in 1864, (Sess. Acts, p. 478,) authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Ib.*

8. SECTION 27, ARTICLE 4, CONSTITUTION OF 1865, which provided that "the General Assembly shall not pass special laws granting to any individual or company the right to lay down railroad tracks in the streets of any city or town," was prospective in its operation only, and did not repeal an act in force at the time of the adoption of the constitution, giving such a right. *Ib.*

9. NON-LIABILITY FOR CATTLE DROWNED ON COMPANY'S LAND. The forty-third section of the Railroad Law, (Wag. Stat., p. 310, § 43,) imposes upon a railroad company no liability to the owner of cattle accidently drowned in an unenclosed well situated on the company's right of way, notwithstanding the loss is occasioned by the failure of the company to erect and maintain proper fences as required by that section. *Hughes v. Hannibal & St. Joseph R. R. Co.*, 325.

10. UNENCLOSED LANDS: PROPRIETOR NOT LIABLE FOR ACCIDENTAL INJURY TO CATTLE COMING UPON THEM. The proprietor of unenclosed land is under no obligation to make it safe for pasturage, and if the cattle of another stray upon it and are killed by drowning in an unguarded well, there is no liability resting upon him for the loss. A railroad company stands upon the same footing as any other proprietor. *Ib.*

11. PASSENGER, RIGHTS OF: "STOCK PASS." A passenger who presents to the conductor a "stock pass" from the railroad company which entitles him to return on their road without payment of fare, can recover damages sustained by him, when so returning, caused by his expulsion from the cars by the conductor for non-payment of the fare, although no physical force was used, and the conductor acted under an honest misunderstanding of the rules of the company in regard to such passes, and although the passenger stated his intention to stop at a station short of that to which his pass entitled him to return. *Graham v. Pacific R. R. Co.*, 536.

12. WHERE a passenger had the right under a "stock pass," to return on defendant's cars from St. Louis to Knob Noster, and was actually on the return trip; *Held*, that under the pass he had the right to stop at Eureka, an intermediate station, and was not liable to pay fare to the latter place. *Ib.*

13. DAMAGES, COMPENSATORY AND EXEMPLARY. A passenger can only recover for a wrongful expulsion from the car of a railroad company, such damages as he has actually sustained, and which he could not

have averted by reasonable exertion, care and prudence, unless he was ejected in a wanton, rude or aggravated manner, indicating oppression, malice or a desire to injure, in which case, he may recover punitive or exemplary damages from the company, where, after knowledge of the fact, they retain in their employ, and in the same capacity, the servant who has been guilty of such misconduct. *Ib.*

14. FORTY-THIRD SECTION OF THE RAILROAD LAW: NEGLIGENCE. In an action under the 43rd section of the railroad law (Wag. Stat., p. 310), there can be no recovery for injuries resulting from the negligent management of a train, (*following Cary v. St. L., K. C. & N. Rwy. Co.*, 60 *Mo.* 209). *Edwards v. Hannibal & St. Jo. R. R. Co.*, 567.

15. RAILROAD FENCES: STATUTES CONSTRUED. The 43rd section of the railroad law does not require railroad companies to erect and maintain fences within the limits of incorporated towns.

The 5th section of the damage act (Wag. Stat., p. 520), does not require them to fence anywhere; but simply dispenses with proof of negligence in the first instance when animals are killed where there are no fences, but where fences might lawfully have been erected. *Ib.*

16. LIABILITY UNDER THE STATUTE FOR KILLING STOCK. A railroad company is not liable under the 43d section of the railroad law (Wag. Stat., p. 310), for stock killed upon its track within the limits of an incorporated city. *Cousins v. Hann. & St. Jo. R. R. Co.*, 572.

17. MASTER AND SERVANT: PLEADING. A railroad company is not liable under the 5th section of the damage act, (Wag. Stat., p. 520,) for stock killed by one of its locomotives which was at the time being used by a servant of the company without authority, for his own purposes and outside of the line of his employment.

This defense need not be specially pleaded, but may be given in evidence under the general issue. *Ib.*

18. DUTY OF CONDUCTOR IN EJECTING PASSENGER. If one goes upon a railroad train intending, in good faith, to become a passenger, the conductor, while he has the undoubted right to put him off if the rule of the company prohibits the carrying of passengers on that train, has no right for that reason to eject him violently, or in such a manner as to imperil his life, as by pushing or ordering him off while the train is in motion, and if he does, the company is responsible in damages for any resulting injury. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

19. DISEASE AS AFFECTING COMPANY'S LIABILITY FOR PERSONAL INJURIES. The liability of a railroad company for a violent ejection of a passenger from its train, is not diminished by the fact that he was at the time suffering from a disease which aggravated the injuries sustained, or rendered them more difficult of cure. *Ib.*

20. STATUTORY LIABILITY FOR INJURIES TO ANIMALS. No action can be maintained, under the 43rd section of the railroad law (Wag., Stat., p. 310), for animals killed within the limits of a town or city; in such cases, where fences have not been, but might lawfully be erected, the action should be brought under section 5 of the damage act (Wag. Stat., p. 520), which dispenses with the proof of negli-

gence, or, the action should be brought at common law. *Elliott v. Hannibal & St. Joseph R. R. Co.*, 683.

21. FENCES. Where, within the limits of a town or city, lands dedicated to public use, and crossing or abutting upon the right of way of a railroad company, are occupied and used for farming purposes, such occupancy does not make it lawful for the railroad company to fence across them, and its failure to do so will not subject it to liability under the 5th section of the damage act. *Ib.*

SEE COUNTY BONDS. 1.

RAPE.

ASSAULT TO RAPE. An indictment under section 32, p. 449, Wag. Stat., for an assault with intent to commit a rape upon a female child under the age of twelve years, need not contain the word "ravish." *State v. Jaeger*, 173.

RAVISH.

SEE RAPE, 1.

REAL PROPERTY.

LIABILITY OF EXECUTOR ADMINISTERING ON REAL ESTATE. Although the general principle is that the realty descends to the heir, and the executor has nothing to do with it, except in case of deficiency of assets; yet, when, as matter of fact, he assumes control of it and collects the rents, or when the will gives him authority to sell, and he exercises the authority, he is liable on his bond as executor, if he fails to account for the rents or for the proceeds of sales. *Dix v. Morris*, 514.

SEE LANDS AND LAND TITLES.

REASONABLE DOUBT.

SEE MURDER, 7, 9, 12.

RECITAL.

SEE EVIDENCE, 19.

RECORDS.

SEE EVIDENCE, 2.

REMOVING CLOUD ON LAND TITLES

See Equity, 2.

RESCISSION.

1. Rescission for misrepresentation. Erroneous representations as to the title to land made by a vendor without fraud pending the negotiation for a sale, will not authorize a rescission of the contract, if the vendee has received a warranty deed, and has taken and continued to retain possession without opposition. *Key v. Jennings*, 356.

2. Rescission for Misdescription. Misdescription of land in a deed, will not authorize rescission of the contract of sale, when it appears that the vendee has been put into possession of the very land which he intended to buy and the vendor intended to sell, and that he has for several years retained undisputed possession; nor when the vendor offers to deliver a deed correctly describing the land. *Ib.*

3. Rescission must be claimed in a reasonable time. When a vendee of land is entitled to have his purchase rescinded by reason of defects in the title to the land, he must exercise his right within at least a reasonable time after discovering the defects. *Ib.*

4. Partial failure of title. A purchase was made of a farm containing 1,269 acres, as to two 40-acre tracts of which there was a failure of title, but it appeared that these tracts were on the outer sides of the farm, and did not destroy its contiguity, or form any special inducements to the purchase, and that the vendor was solvent; *Held*, that as the substance of the contract of purchase was executed without these tracts, the purchaser's remedy for the failure of title thereto was not the rescission of the contract, but a claim for compensation against the vendor. *Ib.*

SALE.

See Caveat Emptor.

Deeds of Trust, 1, 3, 4.

SCHOOLS.

1. Power of school directors to make rules: liability for enforcing them. The school law (W. S., p. 1264, § 8), provides that the board of directors "shall have power to make and enforce all such needful rules and regulations for the government, management and control of the schools and their property as they shall think proper * * not inconsistent with the laws of the land." A board of directors having made a rule that no pupil should, during the school term, attend a social party, the plaintiff, a pupil of the school, by the permission of his parents, violated the rule, and was expelled from the school for so doing. In an action against the directors to

recover damages for the expulsion, *Held*, 1*st*, that under the law, they had the power to make needful rules for the government of pupils while at school, but no power to follow them home and govern their conduct while under the parental eye; that in prescribing the foregoing rule they had gone beyond their power, and had invaded the rights of the parents; but, 2*nd*, as there was no malice, oppression or willfulness on the part of the directors, they were not liable in damages. *Dritt v. Snodgrass*, 286.

2. NORMAL SCHOOL APPROPRIATIONS: ESTOPPEL: SEC. 19, ART. 10, CONSTITUTION OF 1875, abrogated the continuing appropriations for the State Normal Schools made by the act of 1875, (Sess. Acts, p. 78). In January, 1877, without any law authorizing it, the Normal School at Kirksville, drew from the State treasury $5,000, the amount to which it had been entitled under the act of 1875. In the following April the Legislature appropriated $7,500 for the school, for the fiscal year 1877. In mandamus proceedings by the Treasurer of the school to compel the State Auditor to draw a warrant on the State Treasury for the full amount appropriated by the latter act; *Held*, 1st, That the relator was estopped to deny the legality of the payment made to him in January; 2nd, That that payment was to be applied upon the appropriation for the year, and the relator was entitled only to a warrant for $2,500. *The State ex rel. Baird v. Holladay*, 385.

SECRETARY OF STATE.

SEE PARDON, 3.

RAILROAD, 1.

SELF-DEFENSE.

SEE MURDER, 8.

SHERIFF.

1. CONFLICTING EXECUTIONS: SHERIFF'S DUTY: MEASURE OF DAMAGES. Although a sheriff having property in his possession by virtue of a writ of attachment from a court of competent jurisdiction, has no right before the determination of the attachment suit, to sell the property under an execution from a co-ordinate court, issued upon a judgment of foreclosure of a mortgage obtained by another party in a suit begun after the levy of the attachment, yet if he does sell in a case where the mortgage was recorded before the attachment was levied, and is for an amount greater than the value of the property, he will be liable to the attaching plaintiff in nominal damages at most. *Metzner v. Graham*, 653.

2. SALE UNDER EXECUTION: SHERIFF'S POWER TO AMEND DEED. When a sheriff has executed a deed in pursuance of a sale under execution, conveying land by the same description by which it was advertised and sold, his power is at an end. He cannot afterwards

execute another deed conveying by a different description the land which he intended to sell, and which the bidders at the sale understood was being sold. *Ware v. Johnson*, 662.

See Grand Jury.

SHOOTING.

See Negligence, 1.

SPECIAL JUDGE.

See Courts, 3.

SPECIAL TAXES.

1. Pleading: petition on special tax bill. A petition on a special tax-bill sufficiently complies with a provision in a city charter that "it shall be sufficient for plaintiff to plead the making and issue of the tax bill sued on, giving the dates and contents thereof," when it contains the substance of the bill; the bill need not be copied in the petition. *Hunt v. Hopkins*, 98.

2. No personal judgment can be rendered against the owner of real estate for street improvements, made in front of his premises by the city (*following St. Louis v. Allen*, 53. *Mo.* 44). *City of Louisiana v. Miller*, 467.

SPECIFIC PERFORMANCE.

Foreign Lands. The specific performance of a contract for the sale of lands lying in another State, will be decreed in equity, whenever the party is resident within the jurisdiction of the court. *Olney v. Eaton*, 563.

SPITTING OF BLOOD.

See Insurance, 3.

STATUTES.

1. Railroads: acceptance of statutory privileges. An act passed in 1864 (Sess. Acts, p. 478), authorized several railroad companies to connect their lines, and for that purpose granted them certain privileges. No time was prescribed within which the companies should accept the act. The connection was made in 1873; *Held*, that this was an acceptance of the act, and that the acceptance was in time. *Atlantic & Pacific R. R. Co. v. City of St. Louis*, 228.

2. INTERPRETATION OF STATUTES. When the words of a statute are so ambiguous as to create a doubt as to their true meaning, recourse may be had to the occasion of the provision, the mischief complained of and the remedy sought to be applied by the law maker. When the intent has been ascertained, it may be followed, though not strictly according to the letter of the act. *State ex rel. Meinzer v. Diveling*, 375.

3. CONSTITUTIONALITY OF LAWS. The courts are warranted in declaring an act of the Legislature void only where there is a clear conflict between it and the constitution. *In the Matter of Burris*, 442.

SEE CONSTITUTIONAL LAW, 4.

CONTRACT, 2.

STATUTES CONSTRUED.

WAGNER'S STATUTES OF 1872.

Page 89, §§ 48, 49, See Administration, 1.
Page 93, § 1, See Powers, 1.
Page 102, §§ 2, 6, See Administration, 6, 7.
Page 125, § 7, See Deed of Trust, 7.
Page 193, §§ 60, 61, See Attachment, 1.
Page 310, § 43, See Fences, 1, 3, 4, 5.
Page 445, § 1, See Murder 1, 2, 15
Page 446, § 2, See Murder, 1, 2.
Page 447, § 18, See Criminal Law, 1.
Page 516, § 33, See Felony, 1.
Page 520, § 5, See Fences, 3, 4, 5.
Page 520, § 5, See Railroad, 15, 17.
Page 573, § 57, See Election, 1.
Page 698, § 7, See Homestead, 1.
Page 886, § 1, See Champerty.
Page 895, § 6, See Larceny, 2.
Page 1034-6-7, §§ 6, 19, 20. See Judgment, 4.
Page 1054, §§ 13, 15, See Attachment, 1.
Page 1091, § 31, See Larceny, 3.
Page 1264, § 8, See School, 1.
Page 1372, § 1, See Witness, 3.

REVISED STATUTES OF 1855.

Page 1554, § 1, See Deed of Trust, 2.

REVISED STATUTES OF 1825.

Page 328, § 8, See Descent.
Page 527, See Husband and Wife, 4.

TERRITORIAL LAWS.

Pages 66, 83, See Husband and Wife.

ACTS OF 1877.

Page 241, See Larceny, 2.
Page 261, See Habeas Corpus, 1. 2.

ACTS OF 1871.

Page 66, See Railroad, 1.

ACTS OF 1864.

Page 78, See Railroad, 8.

STATUTE OF FRAUDS.

1. No action can be maintained to recover back money or property, which has been paid upon a verbal contract for the purchase of land, if the vendor is willing to execute the contract on his part. *Galway v. Shields*, 313.

2. CASE ADJUDGED. In an action for the value of goods sold and delivered, no recovery can be had, if it appears that such goods were delivered pursuant to a verbal agreement that the price therefor was to be paid in specific land to be conveyed by the buyer to the seller, and the buyer has offered and is ready and willing to comply with his part of the agreement. *Ib.*

STOCK PASS.

See Railroad, 11, 12.

STOLEN PROPERTY.

See Larceny, 1.

STREETS.

Street improvements. The engineer of a city which has power by its charter to provide, by ordinance, for the construction and repair of sidewalks, has no authority to order a sidewalk to be built without an ordinance. *City of Louisiana v. Miller*, 467.

See Municipal Corporation, 1, 2, 3.

SUBROGATION.

Rights of sureties on an administrator's bond who have paid debts of the estate. An administrator having failed to collect and pay over the purchase money of land sold by him to pay a debt which had been allowed against the estate of his decedent, was sued by the creditor on his bond, and his sureties were compelled to pay the debt. In a suit by the sureties to have the administrator's deed to the land set aside as fraudulent and themselves subrogated to the rights of the creditor, and for general relief, the deed was set aside, and *it was Held*, 1st, That they were entitled to have the benefit of the creditor's allowance, and that the proper mode of enforcing their right was to procure an order of the probate court for the sale of the real estate of the deceased to satisfy that allowance; 2nd, That they were not entitled to have the probate court to allow as a claim against the estate of the deceased a judgment which they had obtained against the administrator for the amount of the debt paid by them, together with costs and expenses incurred in resisting payment. *Wernecke v. Kenyon's Admr.*, 275.

SUNDAY.

See Practice, Criminal, 5

TAXES AND TAXATION.

1. Landlord and tenant: contract: taxes. Where by the terms of a lease the lessee was entitled, from time to time, to deduct from the rental all taxes imposed upon the leased property, which the lessee either had paid or might be liable to pay, and there was at the time no law imposing a personal liability for taxes on any one, but any taxes levied upon the property were a lien upon it; *Held*, that the stipulation amounted to an appropriation of a reserved fund out of the rental to the payment of the taxes. *McPherson v. Atlantic and Pacific Railroad Co.*, 103.

2. SECTION 30, ART. 1, CONSTITUTION OF 1865, which provided that "all property subject to taxation ought to be taxed in proportion to its value," while it enjoined a uniform rule in imposing taxes on property, did not abridge the power of the Legislature to provide revenue from other sources, (*following Glasgow v. Rowse*, 43 *Mo.* 479). *American Union Express Company v. City of St. Joseph*, 675.

3. MUNICIPAL POWERS OF TAXATION: UNIFORMITY AND EQUALITY. A city which is authorized by its charter to license, tax and regulate merchants, agents, express companies, insurance companies, &c., has power to impose an *ad valorem* tax upon the gross annual receipts of an express company from its business done in the city, and such tax does not violate the constitutional requirement of uniformity and equality because different from that imposed upon merchants. That requirement is complied with if all persons engaged in the same business are taxed alike. *Ib.*

4. STATE TAXATION ON RECEIPTS OF EXPRESS COMPANIES, NO INFRINGEMENT ON POWER OF CONGRESS TO REGULATE COMMERCE. A tax levied by State authority upon the gross receipts of an express company, whose business consists in receiving goods to be delivered at points outside of the State, to which the company's line does not extend, is not a violation of that provision of the constitution of the United States which confides to Congress alone the power to regulate commerce with foreign nations and among the several States, (*following Erie R. R. Co. v. Pennsylvania*, 15 *Wall.* 284). *Ib.*

5. MUNICIPAL TAX ON EXPRESS COMPANIES: ESTOPPEL. A tax imposed by city ordinance upon the gross receipts of an express company as a compensation for the transaction of its business in the city, is properly collected from the gross earnings without deduction for expenses incurred in conducting the business.

If a part of the gross receipts have been paid out to other companies as their *pro rata* for carrying freight, although in strictness the amounts so paid may not be liable to taxation under the ordinance, yet when they are embraced in the return made by the company itself, and the tax has been paid on the whole, though under protest, it cannot be recovered back. *Ib.*

SEE EQUITY, 7.

NOTICE, 1.

TENDER.

OBLIGATION PAYABLE IN MERCHANDISE: TENDER. A merchant having an established place of business executed a contract for the payment of money in one year after date, but containing a stipulation that it should be "payable in merchandise to be taken during the year." *Held*, that he was under no obligation to tender the merchandise. Readiness on his part at his place of business whenever called upon by the creditor, to perform the contract, prevented any default being attributed to him. It was the duty of the creditor to select and take at his place of business such articles as he desired. *Lakey v. Chadwick*, 622.

THANKSGIVING DAY.

THANKSGIVING DAY: SUNDAY: COMPUTATION OF TIME. Thanksgiving day, although by statute a public holiday, and, for certain purposes, considered to be the same as Sunday, is properly counted as part of the 48 hours within which the defendant is required to make his challenges, after he is furnished with a list of jurors; in computing statute time, Sunday itself should be counted unless expressly excepted. *State v. Green*, 631.

TIME.

SEE THANKSGIVING DAY

TORTS.

1. CHARGE OF UNLAWFUL SHOOTING, SUSTAINED BY PROOF OF NEGLIGENT SHOOTING. Under the present practice, proof of a negligent or careless shooting will sustain an allegation of an unlawful and wrongful shooting; the same was true at common law, where an action of trespass for assault and battery was the proper form of action for direct injuries negligently and carelessly inflicted, as well as for those that were intentional and malicious. *Conway v. Reed*, 346.

2. PERSONAL INJURIES: PRIMA FACIE CASE. In an action for damages, sustained from injuries caused by an unlawful and wrongful assault and shooting, plaintiff is *prima facie* entitled to a verdict upon proof that he was shot by defendant; it then devolves upon the defendant to show that the shooting occurred without fault on his part, or to put in evidence mitigating facts; it is not necessary that plaintiff, in the first place and by direct evidence, should show either an intention to commit the injury or that defendant was in fault. *Ib.*

3. INFANT: LIABILITY FOR TORTS. An infant is liable for a tort in the same manner as an adult. *Ib.*

TRUSTS AND TRUSTEES.

1. SUBSTITUTION OF TRUSTEES IN A DEED OF TRUST. It is not necessary to the validity of proceedings under Rev. Stat. 1855, p. 1554, § 1, for the appointment of the sheriff to act as trustee in executing a deed of trust given to secure the payment of a debt in place of the person therein named as trustee, that the latter shall have signed the deed or otherwise signified his acceptance of the trust; nor is notice of the proceeding required to be given to the trustor. *Martin v. Paxson*, 260.

2. LAND ENTRIES: RESULTING TRUSTS. If one owning a government land-warrant issued in the the name of another, and not assigned by him, enters land under the warrant for himself, but for want of the assignment makes the entry in the name of the other, the latter takes the legal title to the land as trustee for the former. *Key v. Jennings*, 356.

SEE NOTICE, 2.

UNCLE AND NEPHEW

See Insurance, 2.

UNENCLOSED LANDS.

See Fences, 1, 2.

UNITED STATES COLLECTOR'S NOTICE OF SALE.

Succession tax: collector's notice of sale. When the owner of land, on account of which a United States succession tax has been assessed, resides in the same collection district with the land, but not upon it, a collector's notice of seizure and sale of the same to pay the tax, is not lawfully served upon him by leaving a copy at the domicile on the land. *Peyrie v. Schreiber*, 38.

UNITED STATES SUCCESSION TAX.

See Notice, 1.

UNLAWFUL SHOOTING.

See Negligence, 1.

VARIANCE.

Misnomer of instrument sued on: variance. In an action for breach of covenant for quiet enjoyment contained in an instrument designated in the petition as a lease, but of whose contents the defendant is fully apprised, if the instrument, when produced on the trial appears to be not a lease but a mining license, an amendment of the petition may properly be made, but there is no such variance between the allegation and the proof as to authorize a non-suit. *Boone v. Stover*, 430.

VENDOR AND PURCHASER.

See Consignor and Consignee.

Rescission, 1, 2, 3, 4.

VENDOR'S LIEN.

1. Waiver of vendor's lien. Defendant having sold a tract of land to one P., on the same day bought another tract of plaintiff. For the purchase money of the latter tract plaintiff received defendant's two notes, together with the proceeds of defendants sale to P.,

which consisted in part of cash and in part of notes executed by P. Defendant conveyed his land to P., and received from plaintiff a title bond for the land bought of him. A year afterward defendant, at the instance and by the advice of plaintiff, by the payment of $100 obtained from P., a mortgage on the land he had sold P. securing the payment of P.'s notes. Defendant's notes were paid, P. failed to pay his, and plaintiff foreclosed the mortgage, realizing a part of the debt only. In a suit to subject the land sold by plaintiff to defendant to the payment of the unpaid balance; *Held* that by advising and accepting the mortgage from P. plaintiff had waived any vendor's lien he might have had upon this land. *Anderson v. Griffith*, 44.

2. WHO ARE PROPER PARTIES TO A VENDOR'S LIEN SUIT. An administrator sold and conveyed several parcels of land, part of a larger tract, and received the purchase money for the same. His intestate had previously conveyed the entire tract to another party. In a suit by the administrator to enforce a vendor's lien against the entire tract for the purchase money due upon this sale: *Held*, that the purchasers at the administration sale were proper parties defendant. *Chapman, Admr. v. Callahan*, 299.

3. VENDOR'S LIEN: DEFENSE OF FRAUDULENT CONVEYANCE. To defeat such a suit, the purchaser at the administrator's sale may show that no debt was incurred by the grantee in the deed from the intestate, and for this purpose will be allowed to prove that this deed was made without consideration, and in order to hinder and defraud the creditors of the intestate. *Ib.*

4. ESTOPPEL BY PLEA: HUSBAND AND WIFE. A defendant in a vendor's lien case cannot, after a verdict against him upon a plea of payment, avail himself of evidence that he had never contracted to pay for the land, given upon an issue of non-assumpsit made between the plaintiff and other defendants in the case; and where husband and wife are defendants, and the husband has no other interest than as tenant by the courtesy in the land of which his wife is owner, a verdict so rendered affects his interest equally with hers, although he may, in a separate answer, have pleaded non-assumpsit, and, upon a trial, the plea may have been found in his favor. *Ib.*

SEE PRACTICE, 3.

VENUE.

1. CHANGE OF VENUE. A refusal of a judge to admit to bail a prisoner charged with murder, is no evidence that he has prejudged the case, so as to entitle the prisoner to a change of venue. *State v. Alexander*, 148.

2. CHANGE OF VENUE. The court to which a change of venue is granted, obtains jurisdiction of the cause when the order granting the same is made; and a direction to the clerk, contained in the order, that he transmit a transcript of the record to the clerk of the court, to which the venue is ordered, designating it by a wrong name will be rejected as surplusage. *State v. Daniels*, 192.

SEE COURTS, 3.

EJECTMENT, 1.

VERDICT.

1. CONCLUSIVE UPON WEIGHT OF EVIDENCE. The verdict of the jury, upon the weight of evidence, is, in this court, regarded as conclusive in civil cases. *Fletcher v. Drath*, 126.

2. A VERDICT SET ASIDE AS AGAINST THE EVIDENCE. While the Supreme Court will not lightly interfere with the verdict of a jury even in a criminal case, yet when it owes its birth and being to prejudice rather than to evidence, the court will refuse to sanction it.

   In the present case the court, after examining the evidence in detail, sets aside the verdict and reverses the judgment of conviction. *The State v. Jaeger*, 173.

SEE JURY, 1.

WAIVER.

1. RIGHT TO TRUE COPY OF INDICTMENT: WHEN WAIVED. The defendant has, under our statute, a right to a true copy of the indictment 48 hours before his trial, and, if an incorrect copy is furnished, he has the right to demand a true copy, and delay the trial until it is furnished; but, if he pleads without such copy, and makes no objection for want of it, he cannot after verdict, on that account, claim a new trial. (*Lisle v. State*, 6 Mo. 428, *followed.*) *State v. Green*, 631.

2. PRACTICE, CRIMINAL: JURY: WAIVER OF FULL PANEL. A prisoner on trial for a criminal offense cannot consent to a proposal from the prosecuting attorney to go to trial with less than a full panel of jurors. Morally he is in chains; his action is involuntary and cannot constitute a waiver of his legal right to a full panel. Whether he may waive his right of his own motion, and without suggestion from the other side, *quaere?* *The State v. Davis*, 684.

SEE VENDOR'S LIEN.

WILLS.

1. DEVISEE AND EXECUTOR: EJECTMENT. Under the administration act, (Wag. Stat., 89, §§ 48, 49,) a devisee of real estate cannot maintain ejectment against one holding under a lease made by the executor of the devisor in obedience to an order of the probate court. The act expressly authorizes the executor to lease the real estate of his decedent, when so directed by competent authority, and the right of the devisee is subordinate to this. *Eoff v. Thompkins*, 225.

2. EXECUTION OF TESTAMENTARY POWERS: STATUTE CONSTRUED. A power to sell land and invest the proceeds of sale, conferred by a will may, under the statute, (Wag. Stat., p. 93, § 1,) be executed by

an administrator with the will annexed, the donee of the power having refused to execute it. *Evans v. Blackiston*, 437.

3. WILL: INSTRUCTION. When, in a proceeding to contest the validity of a will, the real question is whether the testator was of sound mind at the time of signing, it is error to instruct the jury that the will is void if he was so feeble in mind or body that he was not able to see, and did not see the attesting witnesses sign. Such an instruction is calculated to confuse the jury and to withdraw their attention from the real issue. *Spoonemore v. Cables*, 579.

4. REVOCATION OF WILL: INSTRUCTIONS. When, in such a proceeding, evidence has been given tending to show that after the execution of the will, the testator made other provision for the principal devisee in lieu of that made in the will, the jury should be instructed as to what constitutes a revocation, and it is error to refuse a proper instruction on that subject. *Ib.*

5. DECLARATIONS OF A TESTATOR made after the execution of his will, tending to show that it was not satisfactory to him, and that he had made, or would make other dispositions of his property, are not admissible in evidence for the purpose of impeaching the will, (*following Gibson v. Gibson*, 24 *Mo.* 227, *and Cawthorn v. Haynes*, *Ib.* 237). *Ib.*

SEE ADMINISTRATION, 9

WITNESS.

1. CONTRADICTORY STATEMENTS OF WITNESS. Evidence of contradictory statements made by a witness in regard to his agency, is admissible to show the character of the witness, and to enable the jury to determine the credit to which he is entitled; and a witness cannot, either by his feigned or real forgetfulness of having made such contradictory statement, deprive a party of the right to such evidence; nothing but an admission by the witness that he made the very statement alleged will deprive the party of the right to prove it. *Peck v. Ritchey*, 114.

2. THE CREDIT TO BE GIVEN TO HIM. A witness is not to be disbelieved solely because he made statements out of court inconsistent with his testimony, nor is the converse of this proposition true; the jury are to determine the credibility of the witness from all the facts and circumstances in evidence. *Ib.*

3. INCOMPETENCY OF A SURVIVING PARTY AS A WITNESS. Where one of the original parties to the contract or cause of action in issue and on trial, is dead, the other is not a competent witness, even for the purpose of rebutting testimony given by the adverse party to show admissions made by himself since the death of the deceased. *Ring v. Jamison, Admr.*, 424.

4. IMPEACHMENT OF WITNESS. When, in a proceeding to contest the validity of a will, one of the attesting witnesses has sworn that he had no recollection of having signed the attestation in the presence or at the request of the testator, his affidavit made before the judge

of probate in favor of the will, and containing contrary statements, is admissible in evidence by way of impeachment, after his attention has been properly called to it. *Spoonemore v. Cables*, 579.

5. DRUGGIST NOT A PRIVILEGED WITNESS. A drug and prescription clerk may be compelled to testify what medicines he has furnished to a party to a suit, and it is error for the court to allow his claim of privilege when interrogated as to that matter. *Brown v. Hannibal & St. Joseph R. R. Co.*, 588.

6. TESTIMONY FALSE IN PART; PROVINCE OF THE JURY. If the jury believe that a witness has willfully sworn falsely as to any material fact, they are at liberty to disregard the whole of his evidence, as well those parts of it which may be corroborated by other evidence as those which are uncorroborated. *Ib.*

SEE HUSBAND AND WIFE, 1.